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REPORTS

OF THE DECISIONS OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO,

**INCLUDING PART OF THE APRIL TERM, AND THE SEP-
TEMBER TERM, 1902, AND THE JANUARY TERM,
AND PART OF THE APRIL TERM, 1903.**

JOHN A. GORDON,
REPORTER.

VOL. 18.

THE MILLS PUBLISHING CO.
DENVER, COLO. 7
1904.

**Entered according to Act of Congress in the year One Thousand
Nine Hundred and Four,
By JAMES COWIE, SECRETARY OF STATE
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Rec. Dec. 7, 1904.

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Denver, Colo.**

JUDGES OF THE COURT OF APPEALS OF THE STATE OF COLORADO

When These Opinions Were Rendered.

**ADAIR WILSON, PRESIDENT JUDGE. ¹
CHARLES I. THOMSON, }
JULIUS C. GUNTER, } JUDGES.**

**CHARLES I. THOMSON, PRESIDENT JUDGE.
JULIUS C. GUNTER, }
JOHN M. MAXWELL, } JUDGES.**

**CHARLES C. POST, ATTORNEY GENERAL. ²
NATHAN C. MILLER, ATTORNEY GENERAL.
JAMES C. PERCHARD, CLERK.
JOHN A. GORDON, REPORTER.**

¹ Judge Wilson's term of office having expired April 1, 1903, he was succeeded by John M. Maxwell, and Judge Charles I. Thomson became President Judge.

² Charles C. Post's term of office as Attorney General having expired January 13, 1903, he was succeeded by Nathan C. Miller.

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REPORTS
OF THE
DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO.

April Term, 1902.

[No. 2129.]

GUY V. ROSEWATER.

Principal and Agent—Power of Attorney—Partnership.

A general power of attorney authorizing an agent to enter into possession of, control, sell and assign all real estate and other property belonging to the principal does not empower the agent to enter into a copartnership agreement for his principal with any one.

Appeal from the District Court of Arapahoe County.

Mr. N. Q. TANQUARY and Mr. W. W. ANDERSON,
for appellant.

Mr. W. C. KINGSLEY, for appellee.

WILSON, P. J.

The complaint in this case alleged that the plaintiff, Mrs. Guy, and the defendant entered into a copartnership for the business of mining coal, and buy-

ing and selling coal and coke; that the business was conducted for a few months, and that thereafter the defendant refused to further conduct it according to agreement. It was prayed that the partnership be dissolved, that a receiver be appointed, and that an accounting be had. The answer denied that there ever was a partnership, and also all other allegations of the complaint. Trial was to the court, which found that no partnership had ever been entered into between the parties, and dismissed the complaint. We would be compelled to affirm this judgment under the well-settled rule that as to findings of facts this court will not substitute its judgment for that of the trial court unless the latter is manifestly against the weight of the evidence. Aside from this, however, an examination of the evidence shows that the finding of the court was in accordance with the great weight of the evidence. There was, in fact, no evidence that would have supported a finding to the contrary. There was some little testimony as to some conversation had by the husband of plaintiff with one Joseph Metzler, who was the agent and attorney in fact of the defendant, in which plaintiff's husband was proposing the formation of a partnership, but there was no evidence to show that there was ever any consummation of this proposal, even so far as Metzler was concerned, much less so far as the defendant, Mrs. Rosewater, was concerned. It is not even suggested that either the plaintiff or her husband ever had any agreement with the defendant, or any conversation or any communication with her about it. It is not shown that the parties ever met. It is claimed by the plaintiff, however, that Metzler was the agent for the defendant, but we search the record in vain for any evidence proving or tending to prove an agency conferring upon Metzler any authority to enter into a copartnership agreement for

or on behalf of the defendant. We find in the abstract a general power of attorney given to Metzler by Mrs. Rosewater to enter into possession of, control, sell and assign all her real estate and other property in certain states, including Colorado, but it certainly cannot be contended for an instant that this empowered him to enter into a copartnership agreement for her with any one, or on her account.

The judgment was undoubtedly correct, and will be affirmed.

Affirmed.

GUNTER, J., not sitting.

[No. 2130.]

CROKE V. THE AMERICAN NATIONAL BANK OF DENVER.

1. Water Rights—Findings—Decrees—Departure.

In an action to enjoin defendant from interfering with plaintiff's easement to flow water through a ditch to irrigate certain land, where the court finds plaintiff entitled to use the ditch in question to carry water to irrigate the land designated, subject however to defendant's rights to carry water to irrigate certain other land, a decree which gives plaintiff the right to use the ditch without regard to whether it is being used by defendant is a departure from the findings and will be modified to correspond with the findings.

2. Contracts—Easements—Parol—Water Rights.

A parol contract whereby plaintiff was to construct a ditch through the land of defendant and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch.

3. Same—Notice.

Where one has an easement in a ditch through the lands of another based on an oral contract and had been in open visible use of the ditch for irrigation purposes for several years up to the time the land was sold without any exception of the easement, the purchaser took the land charged with notice of the easement and subject thereto.

4. Conveyances—Easements—Evidence—Estoppel.

Where the owner of land across which another had an ease-

ment in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.

5. Water Rights—Easements—Equity Jurisdiction.

An action to protect an easement in a ditch used for irrigation is peculiarly within the jurisdiction of equity.

Appeal from the District Court of Arapahoe County.

Mr. M. J. BARTLEY, for appellant.

Mr. T. J. O'DONNELL, for appellee.

GUNTER, J.

T. B. Croke, owning a reservoir on section 9 desired to irrigate therefrom 15 acres in section 15. Barker, owning a reservoir on section 10 wanted to irrigate therefrom about 40 acres in the S. W. $\frac{1}{4}$ of section 10. A ditch located on the S. W. $\frac{1}{4}$ of section 10 connecting the reservoir on section 9 with the 15 acres in section 15 would convey the water from both reservoirs to the parcels to be irrigated. Barker, owning the S. W. $\frac{1}{4}$ of section 10 orally agreed that if Croke would build the ditch he would furnish the land and that the ditch should be used by them jointly. In about 1888, pursuant to this understanding, the ditch was constructed by Croke and used as intended by the original parties until 1894, and by their successors in interest until 1897.

The rights of T. B. Croke are held by the present plaintiff, the rights of Barker by present defendant.

In 1897 the defendant refused to allow plaintiff to use the ditch for the conveyance of water in irrigating the 15 acres in section 15.

This action was brought to enjoin defendant from interfering with plaintiff's alleged easement. Plaintiff had judgment; defendant appealed.

1. The complaint stated facts which if established entitled plaintiff to a decree enjoining defendant from interfering with the right of plaintiff to flow through the ditch in question sufficient water to irrigate 15 acres in section 15. There was a direct conflict on the material allegations of the complaint between the testimony of Wright Barker, the main witness for plaintiff, and T. B. Croke, the leading witness for the defendant. The trial court gave credit to the testimony of the former, and found the material allegations of the complaint established. These findings we accept. It is objected that the decree departs the findings. The court finds plaintiff entitled to use the ditch in question for irrigation of 15 acres in section 15 "subject, however, to the right of the said Barker to use the said ditch to carry water from a reservoir situated on said S. W. $\frac{1}{4}$ of section 10 for the irrigation of about 40 acres of his land." The decree, however, permits plaintiff to use the ditch at all times even though defendant is using it, thus departing the findings in not making such use of plaintiff subject to the Barker use, to which last use, as stated, defendant has succeeded. We are not advised by the evidence or findings that the section of ditch in question is of sufficient capacity to permit the simultaneous use of it by plaintiff and defendant to the extent of their above respective rights. If it is not of sufficient capacity to permit such simultaneous joint use the attempt to exercise the same would result in an interference with defendant's superior right. The decree in this particular should conform to the findings by making the use of plaintiff subject to the use of defendant. While

it is testified that it was not the practice to use the ditch by both parties at the same time, there is no reason why it should not be so used, provided it can be done without interference with the above superior right of defendant.

The decree below will be modified here to satisfy this conclusion in the following manner: There will be eliminated from the decree all that portion thereof beginning at the words "to its full capacity for the irrigation of said lands" in folio 229 down to and inclusive of "the irrigation season of each year" in folio 230, and there will be substituted therefor the following:

For carrying water from the said reservoir situated on said E. $\frac{1}{2}$ of section 9, to irrigate the 15 acres of land in said section 15, owned May 19, 1887, by plaintiff, subject, however, to the right of said defendant to use the said ditch to carry water from a reservoir situate on said S. W. $\frac{1}{4}$ of section 10 for the irrigation of about 40 acres of land owned by him May 19, 1887, in said section 10.

2. The contract whereby Barker gave to Croke the right to construct the ditch in question over his land was not in writing. It is contended that such being the case the contract is void under the statute of frauds. The contrary is decided in *DeGraffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; see also *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039.

3. Barker, who granted to T. B. Croke the right to construct and use the ditch in question over his land in section 10, conveyed the S. W. $\frac{1}{4}$ of section 10 to the defendant without making any exception of the easement in question. It is insisted that the defendant took the land without notice of the easement and therefore discharged thereof. The ditch, as stated, was constructed in 1888; it was used by T. B. Croke in irrigating the land in section 15 from that

time until 1894, when defendant purchased the S. W. $\frac{1}{4}$ of section 10 over which this ditch ran. This open, visible use of the easement charged defendant with notice of the interest of T. B. Croke therein.—*McClure v. Coen*, 25 Colo. 284, 53 Pac. 1058; *Irrigation Co. v. Leshner*, 28 Colo. 273, 65 Pac. 44; *New La Junta & Lamar Canal Co. v. Kreybill*, 17 Colo. App. 26, 67 Pac. 1026.

4. Wright Barker, as stated, made a deed to defendant of the S. W. $\frac{1}{4}$ of section 10 in 1894, containing the usual covenants of seizin and right to convey, and that the land conveyed was free from all liens except one specified. Barker was called by plaintiff to testify to the parol grant of the easement in question to T. B. Croke in 1888. Counsel for defendant objected to his testifying "because the said evidence would have a tendency to nullify the deed to the defendant." This plaintiff was not a party to the deed between Barker and the defendant, Edward J. Croke, nor a privy of Barker's grantee, it is not therefore estopped by the recitals in Barker's deed, nor in any other way precluded from showing the falsity of the recitals therein. It was at liberty to show the true facts in contradiction to the recitals in said deed, as it would be to show the true facts in contradiction of any other hearsay statements of Barker.—2 Devlin on Deeds, §§ 820, 821; 2 Wharton on Evidence, §§ 1041, 1042.

5. It is further insisted that this is not a case of equitable cognizance.

As seen from the recitals above the action was brought to protect plaintiff in its enjoyment of an easement; such a proceeding is peculiarly within the jurisdiction of equity.—Pomeroy's Equity Jurisprudence, vol. 3, § 1351; *Fuller et al. v. Swan River Placer Mining Co.*, 12 Colo. 12, 19 Pac. 836.

Let the judgment be affirmed. *Affirmed.*

[No. 2138.]

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY v. MILLS.

1. Receipts—Evidence—Unliquidated Claims.

The rule that a receipt is only prima facie evidence of payment is applicable only to cases where the money is due and the amount is undisputed. If there is no disagreement as to amount a receipt for a less amount, in full of the demand, is without consideration and does not bind the creditor, but if the claim is unliquidated or the amount is in dispute a receipt in full is conclusive against the party giving it. Nor is the settlement affected by the fact that the creditor receives only what the debtor concedes to be due, nor that he takes the money under protest still asserting his claim to the balance.

2. Employer and Employee—Contracts—Wages—Receipts.

Plaintiff had been in defendant's employ as car repairer at fifty dollars per month. He testified that defendant agreed to raise his wages five dollars per month. His pay checks were continued to be made out for fifty dollars. The first one received after the claimed raise of wages he objected to, but his objection was not made to the person authorized to employ men for defendant. He continued in defendant's employ for fourteen months and each month his pay check was made out for fifty dollars, which he accepted and receipted as in full settlement of the month's wages. The person who employed plaintiff testified that his agreement to raise plaintiff's wages was conditioned upon his performance of the work of carpenter and car inspector which he never performed. Held, that plaintiff was not entitled to recover the balance of the wages claimed.

Appeal from the County Court of El Paso County.

Mr. ALBERT E. PATTISON, for appellant.

THOMSON, J.

This suit was brought by appellee against appellant before a justice of the peace. The cause went by appeal to the county court where it was tried before a jury. The verdict was for the plaintiff. Judgment was entered on the verdict for seventy dollars, and the defendant appeals to this court.

The claim made by the plaintiff, as appears from

his testimony, was that he was employed for the defendant as carpenter, and as he furnished his own tools was to receive for his work fifty-five dollars per month. He worked fourteen months and at the end of each month received a time check for fifty dollars, to which was attached a receipt to be signed by him when the money should be paid to him. The money was regularly paid and the receipt signed. The form of the time checks and receipts was exemplified by the following given for November, 1898, the last month of the plaintiff's work, and introduced in evidence by the defendant:

“Form A 340.

Payable by Agent at Roswell.
Chicago, Rock Island & Pacific Ry. Co.
Time Check No. 4949.

Horton, Nov. 30, 1898.

E. H. Mills has worked as car repairer at Roswell, C. D., during the month of November, 1898.

1 month at \$50 per month....	Am't	\$50.00
at \$ per	Am't	\$
Board due	\$	\$
“ “	\$	\$
Bal. payable on this check.....		\$50.00

Approved.

(Signed)	J. M. Fitz Gibbon, Cy., A. S. M. P. & E.
(Signed)	C. W. Snider, C. C.

I hereby acknowledge to have received of the Chicago, Rock Island & Pacific Railway Co. by the hand of H. Wildman, Agt., full settlement for the number of days' work specified on the face of this check.

(Signed)	E. H. Mills, Payee.
(Sig.) O. K.	C. H. Randall, Witness.
(In case of signature by mark.)	
(Stamped across face):	

Not Transferable, Dec. 27, 1898.

Paid Treas.T. C.”

The man with authority to employ carpenters and car repairers was the foreman of the roundhouse, Mr. Adams. Mr. Adams together with Mr. Lucas, chief car inspector under him, made the contract with the plaintiff. When his first time check came the plaintiff told Mr. Lucas that it was five dollars short—that it called for only fifty dollars, and the latter said he would see to it. The subject was not mentioned to Mr. Adams. Prior to his employment the plaintiff had been working for the defendant at fifty dollars per month. When he received his final check he protested that fifty-five dollars and not fifty dollars, per month, was what he was to receive. Nevertheless he signed the receipt. He brought this suit to recover the unpaid five dollars per month.

The testimony of Mr. Adams for the defendant was that his agreement to raise the plaintiff's wages five dollars per month, thus making it fifty-five dollars per month, was expressly conditioned upon his performance of the work of carpenter and car inspector, which work he never performed. That the defendant never assented to the plaintiff's claim of fifty-five dollars per month, is evident from the record. Aside from the testimony of Mr. Adams that he was not to receive that sum unless he rendered certain specified services which he did not render, we have the fact that the time check for each month recited the services as car repairer, and not as carpenter, and allowed him fifty dollars and not fifty-five dollars for his work during that month. When the time check came into his hands it advised him that the company classed him as car repairer, and proposed to pay him as wages fifty dollars per month and no more. With notice that the company placed its entire indebtedness to him for his month's work

at fifty dollars he took the money and signed a paper in which he acknowledged that his claim for the month was settled in full.

It is laid down in the books in general terms that a receipt for money is only *prima facie* evidence of payment, and may be explained or contradicted by parol evidence. But the rule is applicable only to cases where the money is due and the amount is undisputed. If there is no disagreement as to the amount a receipt for a less sum, in full of the entire demand, does not bind the creditor, because it is without consideration. But the rule does not apply to a payment made before the maturity of the debt or to the acceptance of articles other than money in discharge of the liability.—*Fitch v. Sutton*, 5 East 230; *Pinnel's Cases*, 5 Co. 117; *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend. 116; *Bonnell v. Chamberlin*, 26 Conn. 487.

Neither is the rule applicable to the settlement of an unliquidated demand effected fairly, and with full knowledge of all the facts; and a receipt in full given upon such settlement is conclusive against the party giving it. A claim is liquidated when the amount due is fixed by law or has been ascertained and agreed upon by the parties, otherwise it is not; and when it is not, payment of whatever amount received in full settlement of the debt extinguishes the claim, and the receipt given upon the settlement can be avoided only upon evidence of the same nature as that required to set aside a contract. Nor is the settlement affected by the fact that the creditor receives only what the debtor concedes to be due or that he takes the money under protest, still asserting his claim to the balance.—*Simmons v. Almy*, 103 Mass. 33; *Railroad Co. v. Allen*, 46 Ark. 217; *Treat v. Price*, 47 Neb. 875; *Tanner v. Merrill*, 108 Mich. 58; *Fuller*

v. Kemp, 138 N. Y. 231; *Fuller v. Crittenden*, 9 Conn. 401; *Guldager v. Rockwell*, 14 Colo. 459.

In the case at bar the parties disagreed as to the terms of the plaintiff's employment. He claimed he was to receive fifty-five dollars per month. For the defendant it was denied that he was to receive that sum except upon a condition which was never performed. He had previously been working for the defendant at fifty dollars per month; the company continued his employment at the same figure, and a time check for that sum was regularly delivered to him which entitled him to the money provided he should receive it in full payment of the amount due him. He was not compelled so to receive it. He could have asserted his claim by a proper proceeding and had the disputed question settled. But when with knowledge that the money was payable to him on condition of a full discharge of the company from liability on account of wages then due he voluntarily took it, he assented to the company's terms, and the receipt which he gave concludes him.

The judgment will be reversed and remanded for dismissal of the action. *Reversed.*

[No. 2137.]

PARKS ET AL. V. BIEBEL.

1. Evidence—Memorandum Book—Inspection.

Where a witness in testifying referred to a small memorandum book and on cross-examination counsel asked the witness to let him see the book which the witness refused, it was not error to refuse to strike out all the witness's testimony in reference to matters stated to be in the book. The book not being a regular account book but containing private memoranda of other matters as well as of the matter in controversy, counsel had no right to inspect the book, but only the memoranda from which he testified, and this only upon proper application made to the court.

2. Evidence—Statement of Account.

In an action for labor performed upon a road and for hauling, it was not prejudicial error to admit in evidence on behalf of plaintiff a written statement of account testified to as having been made from the original book of accounts which had been subsequently lost, and where all the items on the statement were testified to by the witness, and there was no substantial dispute about any items of the account, but the controversy was as to whether plaintiff had complied with his hauling contract and as to whether defendant's obligation for work on the road was limited to the amount allowed by the county.

Appeal from the District Court of Gunnison County.

Mr. SPRIGG SHACKLEFORD and Mr. S. D. CRUMP, for appellants.

Mr. ALEXANDER GULLETT, Mr. T. J. O'DONNELL and Mr. MILTON SMITH, for appellee.

WILSON, P. J.

Defendants were contractors for building a hotel at Waunita Hot Springs in Gunnison county. The plaintiff, appellee herein, under contract with them hauled their building materials and supplies from the nearest railroad point to the building site, and also under contract with them as alleged did a considerable amount of work in repairing the wagon road between the railroad and the building site so as to put it in proper condition for travel. This suit was brought by plaintiff to recover a balance due him upon account for services rendered in hauling the said building material and for work upon the road. Upon trial the plaintiff testified in his own behalf. In testifying he referred to a small memorandum book where he had made some memoranda in reference to some items and dates of the work done by him. During the cross-examination the following occurred:

“Q. How much have you on the book that you actually performed labor there?

“A. I have not the dates there but we simply charged twenty days for doing this work.

“Q. Let’s see the book.

“A. No, you don’t either.”

(Witness refuses to let examining counsel see the book.)

Counsel for defendants moves to suppress all the testimony of the witness which goes to any of the labor stated to be in this book, unless counsel and the jury have the right to inspect the book.

By the Court: “The evidence of the witness is that he did a certain amount of work. On cross-examination the defendants seek to have him particularize the days that he worked; the witness refers to his book to try and refresh his memory on that point. The court will not sustain the motion to strike out the evidence that he gives if he attempts to use the book, unless it is admitted for inspection. The motion will be overruled.”

Defendants claim this ruling of the court to have been reversible error. It may be conceded that where a witness in testifying makes use of memoranda for the purpose of aiding him in testifying and where it appears that he could not testify precisely as to amounts and dates without the aid of such memoranda, that opposing counsel should be allowed the privilege of inspecting such memoranda; but it is equally true that proper application must be made for the exercise of such privilege. Here no application was made to the court for this privilege, and the court was not even requested to instruct the witness that counsel had a right to inspect the memoranda. It appears further that the book was not a regular account book kept by the witness in his business, but that it contained besides the memoranda which he had made with reference to the business transactions between him and defendants, personal memo-

landa concerning other matters. Counsel even upon proper demand would have had no right to be allowed inspection of anything except the memoranda with reference to the matters in controversy. Even, therefore, if a demand of the witness himself would have been sufficient as was attempted in this case, it was not proper as made, because counsel demanded from the witness the privilege of seeing the entire book, not confining his demand simply to the memoranda concerning the business involved in the suit. Under the facts as presented we think there was no error. It would be most unreasonable to hold that the plaintiff should have lost the benefit of his entire testimony when he was not admonished by the court that it was his duty to submit his memoranda to the inspection of counsel. The court did not err in failing to so instruct the witness because it was not requested so to do.

On behalf of plaintiff there was also offered in evidence the bill of particulars which had been furnished by him, being simply a statement of account showing the items making up the claim of the plaintiff and the items of credit in favor of the defendants. We see no force in the objection to this. If it was error at all to have admitted it, it was error without prejudice. It had been testified that the statement had been prepared and made from the plaintiff's original book of accounts which had been subsequently lost, and all of the items which it contained, both debit and credit, had been testified to by the witness. It was simply a written statement of the entire account and it tended in fact to aid both court and jury in the computation necessary to be made by them. We cannot conceive how defendants could have been at all prejudiced in any event and especially in this case where there seems to have been no substantial dispute about any items of the account.

The controversy between the parties appears to have been as to whether the plaintiff had failed to comply with his hauling contract which was alleged by the defendants and for which they claimed damages, and also whether the defendants were under any legal obligation to pay plaintiff for his services upon the road, anything in excess of what the county allowed. Upon the facts the verdict of the jury was in favor of the plaintiff and we see no substantial error in any action of the court to which our attention has been called. The judgment will therefore be affirmed.

Affirmed.

[No. 2151.]

BARRA V. THE PEOPLE.

1. Judgments—Default—Motion to Set Aside—Meritorious Defense—Excusable Neglect.

The mere fact that a defendant had a meritorious defense to an action is not sufficient to set aside a default and judgment against him, but he must show that his neglect in permitting the judgment to be taken against him was excusable.

2. Same—Negotiations of Settlement.

A motion to set aside a default and judgment which alleges that the neglect to plead was because of negotiations looking toward a settlement, but which fails to allege with whom the negotiations were held and in what they consisted, is insufficient to state a cause of excusable neglect.

3. Same—Forfeited Recognizance—Search for Defendant.

The fact that the surety upon a forfeited recognizance was at the time making search for his absconding principal with a view of procuring his presence in court does not excuse his neglect to plead to an action upon the forfeited recognizance and is not a sufficient showing to set aside a default judgment.

4. Summons—Alias—Presumption.

The clerk of a court has authority to issue an alias summons without an order of court where the original has been destroyed. Where an alias summons was issued without an order of court and served it will be presumed that the original was destroyed before the issuance of the alias and that the clerk had knowledge of its destruction and issued the alias upon proper application.

5. Summons—Default—Motion to Set Aside—Appearance.

A motion to set aside a default judgment on account of excusable neglect was a general appearance and waived the right to question the sufficiency of the summons.

Error to the District Court of Arapahoe County.

Mr. HENRY B. O'REILLY, for plaintiff in error.

Mr. JOHN A. RUSH, of counsel.

Mr. BOOTH M. MALONE, district attorney, and Mr. C. H. REDMOND, deputy district attorney, for defendant in error.

GUNTER, J.

This was an ordinary civil action to recover upon a forfeited recognizance resulting in judgment by default against the defendant. After the entry of judgment defendant filed the following motion:

“Defendant * * * asks that the default and judgment herein be set aside and that he be allowed to file the answer herewith tendered because:

“1. The answer shows that he has a complete, perfect and meritorious defense.

“2. There was no authority in law to issue the summons upon service of which the default was predicated as appears from said answer.

“3. Defendant's neglect to plead herein was because of negotiations looking toward a settlement and to enable this defendant to discover the whereabouts of defendant Maillard and to secure his presence here.”

This motion was denied, and defendant is here on error.

The sole question before us is, Did the court err in denying this motion? Assuming but not holding that this motion and the matter therein contained, in its absence from the bill of exceptions, is properly before us, we think the court did not err. It was in-

cumbent upon the defendant to show that his neglect in permitting the judgment to be taken against him was excusable. This he did not show by the averments of the motion. He says therein that his "neglect to plead" was because of negotiations looking toward a settlement. With whom these negotiations were held and of what they consisted should have been stated in order that the court might know whether they constituted excusable neglect. Search of the defendant for the absconding principal did not justify his neglect to plead. The mere fact that he had a meritorious defense to the action did not justify him in neglecting to plead therein, nor does the existence of such a defense prove that the court erred in declining to set aside the default. Parties cannot be permitted to disregard the process of the court and after judgment is rendered against them come in at their convenience and upon the mere allegation of the existence of a meritorious defense have judgment rendered against them vacated.

The tendered answer, if we can consider it, in its absence from the bill of exceptions—which we do not hold—alleges that the original summons herein was destroyed before service; that an alias was then issued without an order of court; that upon this alias summons service was gotten herein.

Defendant contends that this alias summons was unauthorized, and assigns the alleged invalidity thereof as one ground of vacating the judgment and permitting him to answer to the merits.

As every presumption attends the action of the clerk in issuing the alias in question, presumably the original summons was destroyed before the issuance of the alias, this was known to the clerk and on proper application he issued the alias. If so, he was authorized to issue the alias summons under section 39, Mills' Code. Further, we think defendant waived

the right to question the summons on this ground by his general appearance in asking that the judgment be set aside on account of his excusable neglect and that he be permitted to plead to the merits of the action.

It is not necessary to consider the sufficiency of the tendered answer, because, even if it presents a defense the court did not err in denying its filing.

Judgment affirmed.

Affirmed.

[No. 2140.]

GABOURY V. SMITH ET AL.

Appellate Practice—Findings—Presumptions.

Where under the pleading and evidence the finding of the court could have been such as would sustain the judgment, it will be presumed that it was made.

Appeal from the District Court of Eagle County.

Mr. WM. O'BRIEN, for appellant.

Mr. JOHN A. EWING, for appellee.

GUNTER, J.

This action was upon the following instrument:

“Know all men by these presents: That we, John A. Smith and B. L. Smith, * * * being the owners of the west fifteen (15) feet of lot numbered 10A, of the townsite of Basalt, Colorado, and wishing to secure to Mrs. Anna M. Gaboury, the free access to her property fronting on Railroad street, we, the above named persons, grant such free access over our property. We, as owners of the above named fifteen feet, agree to keep said property free from buildings; provided that it is not bargained and sold to the townsite of Basalt for a public thoroughfare nor bargained and sold to other than the town of Basalt, in which case the said Mrs. Anna M. Gaboury

is to have the first option on the purchase of the same, to be kept by her free from buildings. Also we agree to move a certain log building located on said fifteen feet owned, as above stated, by us, at any time after the lease, now binding, has expired, whenever the said Mrs. Anna M. Gaboury wishes to remove buildings now on her property and erect in their stead a new brick building or other substantial and permanent business block, and provided that thirty days' notice has been given us.

(Signed)

“B. L. Smith.

“J. A. Smith.”

The plaintiff, Mrs. Gaboury, complained therein that the terms of this instrument had been violated in the above 15 feet having been enclosed, and in the failure to remove the log building therefrom. She asked an injunction restraining defendants from enclosing the lot, and for damages; and in the event injunctive relief could not be granted, for permanent damages sustained by plaintiff through the violation of the terms of the instrument.

Plaintiff alleged that the above writing was made in pursuance of an agreement of the parties entered into several weeks before its execution, and that the terms of such agreement constituted its consideration. This the defendants denied, averring that the instrument was without consideration, and denying any violation of the terms thereof. These were issues of fact and were tried to the court.

In behalf of the contentions of plaintiff, the plaintiff, her husband and Mrs. Dwyer testified.

In behalf of the contentions of defendants, defendants B. L. Smith, J. A. Smith and Fred Stiffler testified.

The court found the issues for defendants, the following appearing in the judgment:

This cause coming on to be heard before the

court * * * upon the issues therein joined, as to whether the plaintiff was or is entitled to the use and occupancy and permanent right of way over and across the west fifteen feet of lot No. 10A, of the townsite of Basalt, Colorado, being the ground which adjoins and lies west of the ground purchased by the plaintiff from the defendants, John A. and B. L. Smith, by deed dated December 12, 1895, and upon the issues therein joined as to the right of the plaintiff as against the defendants to the use and occupancy thereof and the permanent right of way thereover, and as to damages sustained on account of removal by plaintiff of part of the log cabin referred to in the complaint, and the court having heard the evidence produced and the arguments of counsel, and being fully advised in the premises, doth find such issues in favor of the defendants; it is therefore ordered, * * * that the complaint be dismissed, * * * .”

The court under the pleadings, evidence, findings and judgment may have found either that the contract sued on was without consideration, or that the defendants, B. L. and J. A. Smith, had not violated the terms thereof, or it might have found on both issues for defendants. Such finding sustains the judgment below as there can be no legal or equitable relief on a contract void for want of consideration, or one the terms of which have not been broken. As under the pleadings, evidence and judgment such could have been the finding of the court; as such finding would sustain the judgment, the presumption is that it was made. By the finding we are concluded. The judgment of the lower court denying any relief upon the alleged contract should be affirmed.

Affirmed.

[No. 2136.]

LOWENSTEIN V. ALEXANDER.

1. Appellate Practice—Abstract of Record—Evidence.

An assignment of error based on the ruling of the court sustaining an objection to the introduction in evidence of an exhibit will not be considered unless such exhibit is contained in the abstract of record.

2. Same.

An assignment of error based on a ruling of the court sustaining an objection to a question propounded to a witness will not be considered unless the question is contained in the abstract of record.

3. Same—Instructions.

Assignments of error based on alleged erroneous instructions will not be considered unless the instructions are contained in the abstract of record.

Appeal from the District Court of La Plata County.

MESSRS. GALBREATH & ELLIS, for appellant.

Mr. N. C. MILLER, for appellee.

THOMSON, J.

Suit upon a promissory note. Plaintiff had judgment and the defendant appeals.

The defendant admitted the execution of the note, but averred payment. He also alleged counterclaims and setoffs more than sufficient to satisfy the claim. The evidence was conflicting. The uncontradicted testimony of either party would have entitled him to judgment; but as the statements of each were denied by the other, the questions of fact were settled by the verdict.

It is assigned for error that the court sustained the plaintiff's objection to the reading in evidence of the defendant's exhibit A. The abstract contains no exhibit A; and not knowing what it was, we are unable to say whether it should have been received or not.

Error is assigned as follows:

“The court erred in permitting the plaintiff to propound to witness, Seth B. Ford, for the purpose of contradicting defendant, the following question: ‘State whether or not Mr. Lowenstein said, in the presence of Mr. Alexander, yourself and possibly Mr. Veitch, at the time of the taking of the inventory, that the terms upon which Mr. Alexander was buying into the store was \$700 in cash and one-half of Mr. Alexander’s interest in the charcoal company,’ because no proper foundation was laid for such question.”

On looking over the abstract we find that prior to the examination of the witness Ford the defendant was, on cross-examination, asked whether, at the time and in the presence mentioned in the question, he made the statement it contained. The foundation for the question was properly laid.

Another assignment is in the following words: “That the court erred in sustaining plaintiff’s objection to the following question, propounded to witness Ford by the defendant: ‘I will ask you, Mr. Ford, if, when the same question was asked you, in taking the last deposition, if your first answer to the question was not, that you understood Mr. Lowenstein to say that the consideration was \$1,000, \$700 of it was paid and \$300 still due?’ ”

No such question is found in the abstract.

Finally, it is charged that the instructions were erroneous. The abstract contains no instructions.

Let the judgment be affirmed.

Affirmed.

[No. 2121.]

18	28
18	351

FLEMING, ADMINISTRATOR OF MELBURN’S ESTATE, V.
KELLY, MAUS & CO.

1. Estates of Decedents—Administrators—Continuing Business
of Deceased.

The general rule is that an executor or administrator is not permitted to engage in trade with the assets of the estate, nor

to carry on the business of the decedent unless expressly so directed by the will, or authorized by the court which has charge of the administration of the estate. If he does, he must himself personally bear all expenses incurred and losses sustained, and account for all profits. But there are exceptions to the rule, as for instance, where it is necessary in a mercantile business or manufactory, temporarily, to continue the business, not for the purpose, primarily, of making profit out of the business, but in order to dispose of and realize upon the assets of the estate to the best advantage. In such case the purchase of some goods may be necessary to aid in the sale of the decedent's stock on hand, and the purchase will be treated as a necessary and allowable expense of settlement of the estate.

2. Same—Presumptions.

Where an administrator under an order of court continued for three years a manufacturing business of the deceased, in the absence of a showing to the contrary, it will be presumed that the court acted wisely in making the order, and that it was necessary to continue the business for three years in order to wind it up to the best advantage of the estate.

3. Same—Claims for Goods Purchased.

Where an administrator under an order of the court continued the manufacturing business of his deceased for three years at a profit to the estate, and during the time purchased some goods which were necessary to the business, and the creditor who sold the goods to the administrator presented his bill as a claim against the estate after the administrator who contracted the debt had resigned and his successor had been appointed, the claim was properly allowed as a second-class claim against the estate.

Appeal from the District Court of Arapahoe County.

Mr. CLAY B. WHITFORD and Mr. HENRY E. MAY,
for appellant.

Messrs. BICKSLER, McLEAN & BENNETT, for ap-
pellee.

WILSON, P. J.

It appears from the stipulation of facts on which this cause was tried in the district court, that one L. A. Melburn dying, the administratrix of his estate, Mrs. Melburn, his widow, was ordered by the county

court to continue to carry on the business of carriage manufacture in which her husband was extensively engaged at the time of his decease. This the administratrix did for the period of about three years, and during such time purchased from the appellee herein certain goods which were used by her in conducting the business. Upon a claim therefor being presented in the county court for allowance against the estate of the deceased, it was resisted by the then administrator, the successor to Mrs. Melburn, who had resigned. The claim was allowed by the county court as of the fourth class, and upon an appeal by the administrator to the district court, it was again allowed, to be paid, however, as a claim of the second class. From this judgment, the administrator appeals to this court.

It is true the general rule is as declared by the authorities that it is not permissible for an executor or an administrator to engage in trade with the assets of the estate, or carry on the business of the decedent unless expressly so directed by the will, or authorized by the court which has charge of the administration of the estate. If he does, he must himself personally bear all expenses incurred, and all losses, and account for all profits. He must answer for the full value of the assets. The rule, however, is not without exceptions, as for instance where it is necessary in a mercantile business or in a manufactory, temporarily, not for the purpose primarily of making profit upon sales as in the ordinary course of business, but in order to dispose of and realize upon the assets of the business to the best advantage.—*Merritt v. Merritt*, 62 Mo. 151. Where he continues the business under such circumstances, it is not regarded in law as the carrying on of the trade or business, but simply as the winding-up of the affairs. In such cases the purchase of some goods may be necessary

for the purpose of aiding in the sale of the decedent's stock of goods, and this purchase will be treated as a necessary and allowable expense of settlement of the estate. Whether paid directly by the administrator and presented in his accounts for allowance, or presented by him before payment, or by the creditor himself, payment will be allowed, and must be made from the assets of the estate.—Williams on Executors, 7th Eng. ed., 1794.

In this case the administratrix acted under the express order of the county court. The order is not set forth in the record, so that we are unable to determine from it whether the court exercised its discretionary power wisely or improvidently. The presumption must be in favor of the former, there being nothing to show the contrary. The mere fact that the administratrix continued the business for the term of three years is not sufficient to justify us in concluding that the business was not being run simply for the purpose of winding it up, and disposing of the entire stock. We must presume the contrary, otherwise the court under whose direction it was being done would have caused it to have been stopped. In this state county courts, in matters of probate business relating to the settlement of the estates of deceased persons, are invested with extensive and unlimited original jurisdiction, legal and equitable, and with large discretionary powers. The power to regulate and control settlement of such estates is expressly conferred upon them.—Constitution, art. 6, sec. 23; Mills' Ann. Stats., sec. 1095, 1097, 1107; *Lusk v. Kershaw*, 17 Colo. 486; *People, etc., v. County Court*, 3 Colo. App. 428; *Clemes v. Fox*, 25 Colo. 45.

From the necessities of the case, neither the legislature nor the constitutional convention could anticipate every business contingency which might

arise in the settlement of an estate, and provide by statute specifically the powers to be exercised by the court in every instance. Primarily, its duty is to see that the assets of the estate are collected and if debts exist converted into money as speedily as possible, consistent with the exercise of proper business discretion so as to prevent a sacrifice, in order that the claims of creditors may be satisfied, and the remainder, if any, be distributed among the heirs at law. It logically and reasonably follows that in furtherance of this general power, the court must have also such powers as may be incidental to it, and necessary to carry it out, and effectuate the purpose.—*People, etc., v. County Court, supra*. Among such incidental powers must of necessity be included, in a proper case, the power to order the continuance of the business by the administrator, temporarily at least, so as to dispose of the stock on hand to the best advantage. The power may be especially necessary and required in case of a manufactory, where it has on hand a large amount of raw material and partly manufactured articles, a sale of which in their then condition would be impossible without a sacrifice. It follows also that in order to carry out the power in such case that it may be absolutely necessary to purchase some other material, and where such purchase is made under such circumstances, we cannot see how it can be other than an expense incurred in the settlement of the estate, and hence proper to be allowed as of the second class, especially so where a profit to the general estate was realized from the business for which the purchase was made. It appearing from the evidence that the business in this case was conducted at a profit, no reason exists for the application of the rule prevailing in some cases that an expense incurred in the conduct of the business should not be allowed as a claim against the general

estate, but that for indemnity therefor the creditor or the administratrix, if she has paid it, should be limited to the assets employed in the business.—Mills' Ann. Stats., sec. 4780; *Howe v. The People*, 7 Colo. App. 540.

Counsel take the broad position, however, that expenses such as this in question can be presented for allowance only in the report of the administrator; that he contracts them, and is primarily liable therefor; that such claims as under the statute are allowable against the estate, can be only those claims which were debts against the decedent at the time of his death. In support of this we are cited to *Lusk v. Patterson*, 2 Colo. App. 310. It must be confessed that counsel therein find some support for their position, if some broad expressions used in the opinion in that case are to be accepted as a statement of the law in all cases. It must be remembered, however, as a fundamental rule, that all utterances of a court must be interpreted by and in connection with the facts to which they are applied. In that case the claim in question was of an attorney at law for services rendered to and under employment by the administratrix alone, without any authority from or order of the court. The claimant there had assisted the administratrix in the discharge of a personal duty devolving upon her because of the fact that she was administratrix. Here the liability was incurred by the administratrix by the express order and direction of the court. She was, as she was compelled to do, rendering obedience to the express mandate of the court. The expense was incurred in the doing of something not within the general scope of the power of the administratrix as such—something which independent of this order, the administratrix would have had no authority to have done, and could not have done, except at her own risk and expense. It

was in effect a liability created by the court itself—that court which must ultimately pass upon its allowance and classification. It further appears that a profit was realized to the estate from the continuation of the business. Whatever the rule may be with reference to a liability of the character of that under consideration in *Lusk v. Patterson*, and incurred as that was without authority, we think that upon reason and principle, a liability such as this, incurred by the express order of the court, is an expense arising in the settlement of the estate, and may be presented either by the creditor, or by the administratrix. The debt was not incurred upon the credit of the administratrix. We believe this conclusion is in harmony with the general doctrines laid down by the authorities with reference to claims arising in the settlement of estates. It would be unreasonable to hold that the administrator must be liable primarily or otherwise, for an expense which he has been compelled to incur by a mandate of the court which has the jurisdiction to control his action. It would be equally unreasonable to hold that the creditor who furnished the materials which were admittedly used in the settlement of the estate, and which aided in making a profit to the estate, and who sold upon the credit of the estate, and presumably upon the order of the court, should be precluded from the remedy pursued by other creditors. This case itself discloses the inequitable results which might ensue if such were the law. Mrs. Melburn, the administratrix who contracted the liability, resigned before any claim was presented. Her successor resisted the allowance of the claim, and it is not to be supposed that he would present it in his report, neither possibly should he be required to do so, because it was not in-

curred by him nor during his administration. We think the judgment of the district court was correct, and that it should be affirmed. *Affirmed.*

[No. 2127.]

THE DENVER LIFE INSURANCE COMPANY v. PRICE.

1. Life Insurance—Cause of Death—Burden of Proof.

In an action upon a policy of life insurance where the defendant answered that death was caused by the intentional taking by deceased of an overdose of a narcotic drug, the burden is on the defendant to prove that the drug is a narcotic and that death was caused by an overdose thereof.

2. Same—Appellate Practice—Findings.

In an action upon a policy of life insurance a finding of the trial court upon conflicting evidence as to whether or not death was caused by an overdose of a narcotic drug is conclusive upon the appellate court where there is sufficient evidence to support the finding.

3. Life Insurance—Cause of Death—Proofs—Evidence.

In an action upon a policy of life insurance plaintiff was not concluded by the statement of the physician in the proof of death furnished to the company as to the cause of the death of insured, but could contradict such statement by other evidence where defendant was notified by the pleading that plaintiff would dispute such statement.

Appeal from the District Court of Arapahoe County.

Mr. WESTBROOK S. DECKER, Mr. H. A. LINDSLEY and Mr. CHARLES F. FURY, for appellant.

Mr. W. D. REED and Mr. TYSON S. DINES, for appellee.

WILSON, P. J.

This suit was upon a policy of life insurance. The defense was based upon a provision in the policy that if the insured should use alcoholic, narcotic or other stimulants so as to impair health, or cause death thereby, then the policy should be null and void. It

was alleged in the answer that the insured "deliberately and on his own motion, and in disregard of its effects upon his life, took a large and overdose of phenacetin, the same being a narcotic, and that the taking of which phenacetin was the sole cause of the death." In the replication the allegation that the insured died from an overdose of phenacetin was denied, and it was averred that death was from some natural cause, unknown to the plaintiff. By the pleadings two issues were presented: 1. Whether phenacetin was a narcotic. 2. Whether death was caused by an overdose of it. These were questions of fact, and the burden to prove each was upon the defendant company. The finding of the court was adverse to the defendant, and not being manifestly against the weight of the evidence, and it being ample to support the finding, this court is under the well-settled rule bound by it.

The chief contention of defendant, however, upon which it relies for a reversal of the judgment, grows out of the proofs of death. It appears that in what is called the certificate of the attending physician, appended to and made a part of the proof of death, made out upon a printed form furnished by the company, the physician, in answer to the printed question, "State the remote cause of death and all predisposing features," stated, "Paralysis of the heart, due to an overdose of phenacetin." It was claimed that the beneficiary, wife of the deceased, adopted and was bound by this answer, because in the statement made out by her, constituting a part of the proof of death, also made out upon a printed form furnished by the company, in answer to a question as to the cause of death, she replied: "See physician's statement." It was shown by the testimony of the physician himself, who made out the certificate, that he was not in attendance upon the deceased before or at the time of his

death; that death was very sudden, and he, the physician, did not see the insured until after he was dead, and that in making out the statement as to the cause of death, he relied upon hearsay, he having been told by a clerk of the deceased that the insured had the evening before his death taken a dose of phenacetin. Even this, however, was denied by the clerk in his testimony. Notwithstanding these facts, defendant urges that the plaintiff was estopped from denying that death was from any other cause than that stated in this certificate of the attending physician, which she had adopted as her answer in her affidavit making proof of death, and that it was reversible error in the court to permit evidence to be received contradicting this certificate. The position of defendant is contrary to the overwhelming weight of authority. Even if the physician in this case had been the attending physician of the insured, it has been held by very high authority that the beneficiary should not be held responsible for any misstatement contained therein not caused by her.—*Cushman v. Life Ins. Co.*, 70 N. Y. 79. In that case it was said by the court, speaking of the beneficiary: “He was responsible for the statement made by himself, but not for the statements which he was required to procure from the attending physician, the officiating clergyman and the undertaker. Such statements were procured at the request of the defendant for its information, and it must take them for what they may be worth. The plaintiff had no means of compelling answers in such statements to suit himself.” None of the elements of an estoppel are shown here. The defendant did not rely upon this statement, and so relying, change its situation in any manner so as to contract or incur any liability. Before it was made, that had occurred—namely, the death of the insured—which gave rise to its liability, if any existed. The disproof of the statement made in the

certificate of the attending physician did not create, increase or change the liability of defendant. The utmost extent to which the authorities go is that a beneficiary in a suit upon a policy of life insurance should not be allowed to dispute a statement in the proof of loss, as to the cause of death, for the first time at the trial—that a defendant must have some notice of the intention to deny it. In this instance, the defendant had ample notice, this being specifically given in the replication filed by plaintiff several months before the case came to trial. See Bliss on Life Insurance, § 265; *McMaster v. Ins. Co.*, 55 N. Y. 229; *Fisher v. Life Association*, 188 Pa. St. 13; *Hanna v. Ins. Co.*, 150 N. Y. 530; *Ins. Co. v. Dick*, 44 L. R. A. 846. To the report of the last cited case, which was by the supreme court of Michigan, is appended an able and instructive note, in which the whole question here presented is fully reviewed, and a large number of authorities cited.

In support of its contention, defendant relies chiefly upon two authorities: *Campbell v. Charter Oak Ins. Co.*, 10 Allen (Mass.) 213; *Irving v. Excelsior Ins. Co.*, 1 Bosw. (N. Y.) 507. As we read them they do not support its position, but on the contrary are as far as they go in accord with the general weight of authority. They do not hold that an incorrect statement in proofs of loss cannot be disputed or corrected. The extent to which they go is that the correction or denial could not be first made known to the insurers at the trial of the action to recover for the loss, and for the obvious reason that the correction or denial at such a time would be a surprise. In referring to these cases, the United States supreme court said: “Neither of the cases can be considered as deciding that the insured is estopped by an erroneous statement of a fact in the proofs of loss furnished by him, even though the true statement of that

fact be a condition of the policy.”—*Life Ins. Co. v. Schwenk*, 94 U. S. 597. It cannot be said that any duty devolved upon the plaintiff to have procured and furnished a new statement correcting the mistake before she should have been permitted to furnish her proofs, because there was no attending physician, and this was, of course, impossible. The cause of death, as alleged in her replication, was unknown.

We think there was no error in the rulings or findings of the court, and the judgment will be affirmed.

Affirmed.

[No. 2126.]

HARRIS ET AL. V. HARRIS, AS SURVIVING PARTNER OF
HARRIS & SON.

1. Pleading—Contracts—Principal and Subcontractors.

A complaint which alleges that plaintiffs made an agreement with the contractor who was constructing a building for defendant to furnish the material and plaster the building for a certain price, and that before they commenced work defendant agreed with plaintiffs that if they would do said plastering and furnish material therefor, he would pay plaintiffs the sum agreed on by plaintiffs and the contractor, states a cause of action against defendant as owner and in favor of plaintiffs as principal contractors.

2. Judgments—Parties—Mechanics’ Liens.

In an action for a personal judgment against the owner and to enforce a mechanics’ lien on real estate where plaintiffs claimed under a contract originally made with a contractor under defendant, but which defendant assumed and made his own contract before plaintiffs commenced work thereunder, and in which action said contractor was joined as a party defendant, the fact that no final disposition was made of the case as to said contractor would not affect the validity of a personal judgment against the owner or a lien decreed upon the real estate.

Appeal from the District Court of Arapahoe County.

Mr. H. A. LINDSLEY, for appellants.

Mr. WESTBROOK S. DECKER, of counsel.

Mr. THOMAS B. STUART and Mr. CHARLES A. MURRAY, for appellee.

GUNTER, J.

Appellants contend that the cause of action of the amended complaint departs that of the original in this: That the cause of action of the former was in favor of plaintiffs as subcontractors, of the latter in behalf of plaintiffs as principal contractors.

1. The cause of action of the original complaint was passed upon in the former appeal, *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841, the court saying:

“The complaint contains the following allegation: ‘That before the doing of any work by these plaintiffs, said John H. Harris promised these plaintiffs that whatever sum should become due them for said labor and materials would be paid by him.’ In the statement of the lien claim it was said: ‘That on or about the 10th day of July said John H. Harris, the owner, agreed with said claimants that if they would do said plastering and furnish material therefor he would pay claimants the sum of \$250.’ * * *

The facts set out in the statement would, if established, show an original contract and employment between claimants and Harris. * * * In the complaint it is stated that the promise was made before appellees commenced work. In the statement filed it was alleged that the promise by Harris was on the 10th of July, and that work commenced upon the 6th. If the evidence should show that the promise was made before the commencement of the work and was the inducement, *then the personal judgment might be given,* * * * The complaint appears to contain every important allegation and fact, if established, to constitute a cause of action; * * *” (The italics are ours.

It is thus seen that the original complaint stated

a cause of action against the defendant John H. Harris as owner and in favor of claimants (then plaintiffs) as principal contractors. Under such complaint claimants were entitled to establish a lien on the bettered premises.—Mills' Ann. Stats., vol. 3, sec. 2867.

That the original complaint might have been obnoxious to the charge of misjoinder or duplicity is not the question before us; the question is, did it state a cause of action in favor of the predecessors in interest of the present plaintiffs as original contractors? We think it did. If so, the cause of action is not changed in the amended complaint.

2. It is further contended by appellants that the evidence does not show that the contract between claimants, predecessors in interest of appellees, and John H. Harris was made before claimants had begun to furnish materials and perform labor.

If material—which we do not hold—the court found, upon conflicting evidence, this fact established by claimants, a section of the court's finding being as follows:

“That on or about the 6th day of March, 1893, the plaintiff and the said James Harris, as partners, made and entered into an agreement with the defendant, William Miller, to furnish the material and lath and plaster the said building; that the said Miller agreed to pay them therefor the sum of \$250 upon the completion of said plastering by them.

“That thereafter they notified the defendant, John H. Harris, that they could not trust the said Miller and would not do said work unless he, the defendant, John H. Harris, would agree to pay them for the same, and thereupon the defendant, John H. Harris, personally directed the said James Harris & Son to do said work, and did then and there personally promise that in consideration of their performance of said work, he would pay them upon completion there-

of the sum of \$250, which was the fair value of the same.

“That thereafter, on or about the 6th day of July, 1893, the plaintiffs began their work under said contract, and did furnish in and upon said building all the labor and materials necessary to complete the lathing and plastering of the same, and did complete their said work therein and thereon on the 16th day of September, 1893.”

3. It is contended that the lien statement is not sufficiently explicit as to contract of claimants to sustain a judgment in their favor as original contractors. This contention is disposed of in *Harris v. Harris*, *supra*, the court saying:

“The facts set out in the statement, if established, show an original contract and employment between claimants and Harris.”

4. It is further complained that the court made no final disposition of the case as to Miller, the party with whom appellants contracted for the construction of the house upon which claimants performed their labor and who was a party defendant in the proceeding below.

We can see no reason why failure to make a disposition of the case as to Miller—if there was such failure—should affect the validity of the personal judgment herein against John H. Harris, and the lien decreed upon the real estate for which the labor was performed and material furnished.

The original complaint stated a cause of action in favor of these plaintiffs as original contractors against John H. Harris as owner, and facts which, if proven, would justify a lien against the real estate involved. The amended complaint presents the same cause of action. The court, upon conflicting evidence,

found the cause of action established and entered a judgment in accordance therewith. We see no reason to reverse it.

Judgment affirmed.

Affirmed.

[No. 2122.]

CANNON ET AL. V. THE BRECKENRIDGE MERCANTILE
COMPANY.

Corporations—Annual Reports—Liability of Directors.

The failure of a corporation to file the annual report as required by section 491, Mills' Ann. Stats., renders the directors of the corporation personally liable for all debts contracted within the year next preceding the time when it should have been filed unless the capital stock of the corporation has been fully paid up and a certificate of that fact made and filed. Upon the expiration of the time without the filing of such report a right of action at once accrues in favor of a creditor against the directors and the fact that the capital stock had been fully paid in and a certificate of that fact made within the time but which was not filed until six days after the expiration of the time within which the report was required to be filed, would not relieve the directors of the liability.

Appeal from the County Court of Arapahoe County.

Mr. CHARLES T. BROWN and Mr. EDMUND J. CHURCHILL, for appellants.

Messrs. ROGERS, CUTHBERT & ELLIS, for appellee.

Mr. PIERPONT FULLER, of counsel.

WILSON, P. J.

This suit was brought to enforce the personal liability of directors for the debt of the corporation, because of a failure to file the annual report as required by statute.—Gen. Stats., sec. 252; Mills' Ann. Stats., sec. 491. Neither the existence of the debt nor the liability of the corporation therefor is contested; and that it was incurred within the year preceding the

time when the annual report should have been filed, is conceded. It is also admitted that the annual report was not filed within the sixty days from the first of January, nor indeed at any time before the commencement of this suit. It is also admitted that a certificate of full paid-up capital stock had not been filed in any office where it was required to be filed prior to the expiration of the time limited for the filing of the annual report. Such a certificate was prepared, signed and verified on February 28, but it was not filed in any office until March 7. The time limited for the filing of the annual report expired March 1; the certificate of paid-up capital stock was therefore filed six days too late. Under the plain reading of the statute—and it has been repeatedly so held by this court—a right of action by a creditor against the defaulting directors accrued immediately upon default being made. By the plain language of the act, the only thing which would excuse the making of this report would be the making and filing of the certificate of paid-up stock, previous to the expiration of the time when the annual report was required to be made. The making alone would not excuse it because the statute reads, “made and filed.” There is no room for construction. Both the making and the filing were required. The requirement is a most reasonable one, too, because it is the filing alone which gives the requisite publicity, and which in reality effectuates the purpose and intent of the statute. It certainly cannot be contended that this court would have any power to extend the time six days, or even one day. If so, we might with the same propriety extend it thirty days, or sixty days. Instantly upon the default being made with reference to the filing of the annual report within the time limited, a right of action accrued to the plaintiff against the directors.—*Colo. Fuel & Iron Co. v. Lenhart*, 6 Colo.

App. 515; *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 369; *Hazelton v. Porter*, 17 Colo. App. 1, 67 Pac. 170. Nothing which the directors could subsequently do could relieve them from the liability which had attached, and most certainly it is not within the power of this court to grant them relief from the consequences of their default, incurred by a failure to comply with a mandatory requirement of the statute.

The New York cases cited by counsel are not in point, because evidently based upon a different statute. Ours is not silent as to the time within which the certificate of paid-up stock must be filed. By the plain and unmistakable language of ours, as we have seen, this certificate must be not only made but filed before the expiration of the time for filing the annual report, in order to relieve the directors from liability.

This is the only question in the case. Upon the conceded facts, any other judgment than that which was rendered would have been manifest error. The judgment was clearly correct, and will be affirmed.

Affirmed.

[No. 2672.]

RIZER ET AL. V. THE PEOPLE EX REL.

1. Cities and Towns—Elections—Office of Mayor—Filling Vacancy—Mandamus.

Under section 4488, Mills' Ann. Stats., providing that in case a vacancy occurs in the office of mayor of a city, the city council shall order a special election as soon as practicable to fill the vacancy, it is the duty of the city council to order such special election at its first regular session after a vacancy occurs, and in case of a failure or refusal to do so mandamus will lie to compel them to order such election.

2. Same—Election Expenses.

Where a vacancy occurs in the office of mayor of a city, the fact that the last annual appropriation for election expenses was exhausted by the general election which followed it is no valid

reason for the city council refusing to order a special election to fill the vacancy.

3. Same—Demand.

Where a city council failed to order a special election to fill a vacancy in the office of mayor as required by statute, no formal demand on the council to order such election was necessary before commencing an action of mandamus to compel them to do so.

4. Same—Relators.

Where a city council fails to order a special election to fill a vacancy in the office of mayor as required by statute mandamus may be instituted to compel them to do so upon the relation of private citizens.

Error to the District Court of Pueblo County.

Mr. M. J. GALLIGAN and Mr. F. R. McALINEY, for plaintiffs in error.

Mr. J. E. RIZER, *pro se*.

Mr. CHAS. E. GAST and Mr. MILES SAUNDERS, for defendants in error.

THOMSON, J.

At the regular election held in the city of Pueblo in April, 1901, George F. West was duly elected mayor of that city for the term commencing in that month, and ending in April, 1903. Mr. West died in December, 1901; and, on the 4th day of January, 1902, the city council appointed J. E. Rizer to temporarily act as mayor. In February, 1902, at a regular meeting of the city council, the members being all present, a resolution was offered for the calling of a special election for mayor to serve the unexpired term of Mr. West, which, upon being submitted to a vote, was rejected. Afterwards, during the same month, at a regular meeting of the council, the members being all present, another resolution providing that a special election be called to fill the vacancy was offered and defeated.

This action was brought in the name of the people of the state on the relation of a number of residents, electors and taxpayers of the city of Pueblo, to compel the city council to cause a special election to be called for the purpose of electing a mayor to fill the vacancy.

The answer to the alternative writ alleged that no demand had ever been made upon the respondents for a special election; it denied that they did not intend to call a special election; it averred that they would do so as soon as, in their opinion and discretion, such action would be practicable, but that in their opinion and judgment, and in the exercise of their discretion it had never been practicable since the death of Mr. West. It alleged further that there was no appropriation to which resort could be had for the payment of the expenses of a special election; that there was no unexpended money provided for in the annual appropriation ordinance for the fiscal year beginning April 1, 1901, which could be legally used in the payment of such expenses; that the available funds in the treasury were required by the city for other than election purposes, and that the ordering of a special election required an investigation of facts, and the exercise of judgment. The answer also raised the question of the legal capacity of the relators to bring the action.

The cause was submitted upon the alternative writ and answer. The court adjudged the answer insufficient, and awarded a peremptory writ. The respondents have brought the judgment here for review by writ of error.

The following points are made in behalf of the respondents: First—It rested in the discretion, or, at least in the judgment, of the respondents to say when the election should be ordered. Second—No appropriation for the expenses of the election had

been made, and there was no available money in the treasury which could be lawfully used for their payment. Third—Before the respondents were legally bound to act, a demand upon them for action must be made. Fourth—The relators, being private citizens, could not institute the proceeding in the name of the people, except upon the refusal of the attorney general to act.

1. The following occurs in our statutes concerning municipal corporations:

“In case of the mayor’s death, disability, resignation, or other vacation of his office, the city council shall order a special election as soon as practicable to fill the vacancy for the remainder of the term of office, and may appoint some qualified elector to act as mayor until such special election.”—Mills’ Ann. Stats., sec. 4488.

In this connection, it is the effect of the words “as soon as practicable” upon which counsel disagree. The view of the question taken for the respondents, is thus expressed in argument: “To order a special election under that statute is not a ministerial act, but an act that requires investigation, and the exercise of discretion and judgment, to determine when it is practicable.” The proposition that mandamus does not lie to control discretion or judgment, requires no citation of authorities; so that the question is whether the language of the law leaves anything to the discretion or judgment of the council. It is true that the statute does not require action within a specified number of days after the vacancy occurs; but if it furnishes a rule by which the time for action by the council may be ascertained, then on the principle that what may be made certain is certain, the effect is the same, and the duty to move, equally peremptory.

The word “practicable” means “feasible.” An

act is practicable of which conditions or circumstances permit the performance. The proceedings of a city council must be conducted at meetings lawfully convened, otherwise they are void. The statute empowers it to determine the time and place of holding its meetings; and when it is regularly assembled, it is prepared for the exercise of its functions, and the transaction of its lawful business. Until legally in session, it is, of course, impracticable for it to order an election to fill the vacancy; but at its first regular meeting after the vacancy occurs, there is no reason why it may not proceed to the ordering of an election. The statutory provision we have quoted seems to contemplate the making of the order first, and then the selection of some elector to act as mayor until the election shall take place. But whether the language may be so construed or not, in virtue of the powers with which the statute has clothed the city council, it may, in conformity with law, order the election at its first regular meeting after the office becomes vacant. It was at a regular meeting that Mr. Rizer was appointed to act as mayor; it was, therefore, practicable for the respondents then to make the necessary order. Subsequently, it was at a regular meeting that the first resolution was offered looking to the holding of an election, and, at that time also, the making of the order was practicable; and it was again practicable when the second resolution was presented. The law determines the question of practicability; and when the making of the order for the election became practicable, the respondents were without discretion to say, or the power of judgment to determine, that it was impracticable.—See *State v. School Directors*, 74 Mo. 21.

But for the respondents it is urged that the provision we have quoted must be construed in connec-

tion with section 1588 of Mills' Statutes, which reads as follows:

“Special elections shall be conducted and the results thereof canvassed and certified in all respects as near as practicable in like manner as general elections, except as otherwise provided; but special elections shall not be held unless when required by public good, and in no case within ninety days next preceding a general election.”

It is argued that the determination of the question whether a special election to fill a vacancy caused by the death of the mayor is required by the public good, requires the exercise of judgment by the city council, and that this proceeding must fail because such exercise is not subject to judicial control. But even if that section, which occurs among statutory provisions relating solely to the election of members of the legislature, and of state and county officers, and to the manner of filling vacancies occurring in legislative, state and county offices, could be held applicable to municipal offices, it still affords no ground for counsel's contention. The argument rests upon a false assumption. However the question concerning the public good may arise, or in what manner soever it must be determined in other cases, the law has decided it in this. It is not left to the judgment of the council. The mayor is an indispensable factor in the municipal government. Every ordinance passed by the council, and every resolution or contract adopted by it involving the expenditure of money, must be submitted to the mayor, and unless it receives his approval and signature, or, unless, after he has disapproved it, it is passed or adopted by a majority of two-thirds of the members elected to the council, it has no validity.—3 Mills' Ann. Stats., sec. 4442a. All commissions, licenses and per-

mits granted by the authority of the council, must be signed by him.—2 Mills' Ann. Stats., sec. 4487.

The machinery of the municipal government could not move without the mayor. Now, the office of mayor can be filled only by the suffrages of the qualified voters of the city. The mayor can be chosen in no other way. If he die or resign, the council may appoint a qualified elector to act as mayor until the office can be again filled by election. But the appointee is not the mayor. He is simply a substitute. His appointment is a mere temporary expedient, designed to avoid a suspension or interruption of the office during the time which must elapse before a mayor can be elected. The law gives the people the right to have the office filled by a man of their own choice; and hence the provision, in case of a vacancy, of affording them as early an opportunity as is practicable to select the person who shall fill it. So far as the city is concerned, it is the theory of the law that the public good requires that the office of mayor shall be filled by a person chosen *by* the people, and not *for* them. Whether the public good requires a special election to fill a vacancy in the office of mayor, has not been left an open question.

2. We do not think the fact that the last annual appropriation for election expenses had been practically exhausted by the general election which followed it, furnishes the respondents with any valid reason for refusing to order the election. The statute made it their imperative duty to do so as soon as practicable, and they had no alternative but to obey its requirement. See *Gibbs v. Bartlett*, 63 Calif. 117. If additional appropriation was necessary, the statute provides a method for securing it, which, for aught that appears in the answer, was entirely feasible.—2 Mills' Ann. Stats., sec. 4447. But if lack of funds would excuse the calling of a special election, it would

also relieve the council from the duty of holding a general election. There might be a failure to make an appropriation for the expenses of the general election, and so being without funds to defray those expenses, the council might refuse to take the necessary steps for holding it. Thus the incumbents might hold fast to their offices for an indefinite period. The requirements of the law cannot be thus evaded.

But even if, under other circumstances, some validity might be conceded to the excuse of want of funds, the facts and conditions disclosed by the record before us would render it unavailable in this action. The fiscal year of each city and town commences on the first day of April of each year. It is the duty of the council during the last quarter of each fiscal year to pass the annual appropriation ordinance for the ensuing year, appropriating sufficient moneys to defray the necessary expenses and liabilities of the corporation.—2 Mills' Ann. Stats., sec. 4447. The mayor died in December. The last quarter of the fiscal year commenced on the first day of January following. If the election had been ordered as the law requires, the annual appropriation ordinance could have been passed and the expenses of the election provided for before any outlay would have been required. The day for the election could have been so fixed that the appropriation would have been available. The duty of ordering the election involved the duty of doing whatever else might be requisite for the purpose of holding it.

3. These relators have no private interest peculiar to themselves, in the act or duty, the performance of which is demanded. If they had, demand and refusal would be an essential precedent condition to the relief sought. But the weight of authority is that where a duty is enjoined by law which is strictly public in its nature and concerns one individual no more

than another, no formal demand or refusal is necessary. The law constitutes the demand, and the neglect to perform, the refusal.—High Ex. Rem., § 41; *State v. Common Council*, 33 N. J. L. 110; *People v. Mount Morris*, 137 Ill. 576; *Railroad Co. v. Plumas County*, 37 Calif. 354; 19 Am. & Eng. Ency. of Law, 2 ed. 759.

4. The objection that the relators, being merely private citizens, have no right to the remedy sought in this proceeding, cannot be sustained. They are seeking the enforcement of a public right. In a case like this the people are regarded as the real party, and it is not necessary that the relator should have a special interest in the result, or that he should be a public officer. A private citizen may be a relator where public right is sought to be enforced.—*People v. Collins*, 19 Wend. 56; *Hamilton v. State*, 3 Ind. 432; *County of Pike v. State*, 11 Ill. 202; *State v. School Board*, 131 Mo. 505; High Ex. Rem. § 431. It is true that on the question who, in such case, may be a relator, the authorities are not unanimous; but the doctrine of the cases we have cited is the doctrine of our supreme court.—*Wheeler v. Irrigation Co.*, 9 Colo. 248. It is suggested, however, that the utterance in the opinion delivered in the case last cited, affecting the question of the necessary qualifications of a relator, is mere dictum, and, therefore, not authority. Until the court responsible for it rejects it as dictum we shall accept it as a statement of the law.

The judgment below awards a peremptory writ commanding the respondents to “call” a special election. Exception is taken to the phraseology. The word used in the statute is “order.” The meaning of the language of the judgment cannot be very well misunderstood. It uses “call” as synonymous with “order.” Nevertheless, it is not strictly accurate; and although we think the judgment good as it stands, to obviate possible technical objection it should be

amended so as to conform to the statutory phraseology. The court is directed, without motion, so to amend it, and, as the time named in the judgment for making the order has elapsed, to further amend it by fixing another date for action by the respondents, and, as amended, it is affirmed. *Affirmed.*

[No. 1997.]

STEINHAUER ET AL. V. ARKINS.

School of Mines—Board of Trustees—Diplomas—Mandamus.

The board of trustees of the school of mines has no authority to issue a diploma to a student of the school except when required to do so by the school speaking through its faculty. And mandamus will not lie to compel the board of trustees to issue such diploma where the plaintiff has failed to pass the examination required by the faculty, although his failure may have been chargeable to the hostility and wrongful conduct of the faculty.

Appeal from the District Court of Arapahoe County.

On Rehearing.

Mr. H. RIDDELL, for appellants.

Mr. E. T. WELLS, Mr. M. F. TAYLOR and Mr. JOHN T. BOTTOM, for appellee.

THOMSON, J.

The complaint alleged that the defendants were trustees of The Colorado State School of Mines, having authority and control over the administration of the affairs of that institution, with power to make rules and regulations for the government of the students, to provide and direct suitable methods for their education, and to confer degrees upon those taking the prescribed line of study; that at the September term, 1893, the plaintiff entered the school, and was enrolled therein as a student, and continuously pursued his studies, until the close of the ses-

sion of 1896-97; that he was of good moral character, obedient and attentive, took high rank as a student, and became fully equipped with the knowledge and scientific information necessary to entitle him to a degree as mining engineer; that the president and professors of the school, without cause or provocation, became inimical to the plaintiff, and conspired together to prevent him from obtaining his degree as mining engineer; that in April, 1897, for the accomplishment of their purpose, they deprived him of his rank as a student, and notified him that he would not be permitted to graduate with his class; that, thereupon, he appealed to the board of trustees, who ordered that he be permitted to continue the regular course of the graduating class to the end of the school year, taking such examinations as belonged to his course, that the faculty make report to the board at its next meeting of the result of such examination, and that the examination should not be severer than that of other members of his class; that in defiance of the order so made by the board of trustees, actuated by malice against the plaintiff, still conspiring to prevent him from receiving his graduating degree, and, proposing to render it impossible for him to pass an examination, the faculty exacted of him answers never required of his class, subjected him to a line of examination entirely at variance with the order of the board, and, refusing him an opportunity to be heard, reported against his right to graduate, charging him with reprehensible conduct of which he was not guilty; that the board of trustees—these defendants—without investigation, accepted the report of the faculty as final, and refused to allow him to graduate, although a diploma entitling him to a degree as mining engineer had been prepared and was in their possession; and that the plaintiff, in his attendance upon the school, had expended more than

\$2,000. The prayer was for a decree that the defendants issue to the plaintiff the regular diploma evidencing the degree of mining engineer of the Colorado school of mines.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendants declining to plead further, judgment was rendered in favor of the plaintiff according to the prayer of his complaint. The defendants have brought the case here by appeal.

The question presented by this demurrer is whether, upon the averments of the complaint, the plaintiff is entitled to the relief which he seeks. From the statements in that pleading, it appears that, as an essential prerequisite to the conferring upon him of a degree, he must pass an examination to the satisfaction of the faculty.

The following is section 3074 of Mills' Annotated Statutes: "The State School of Mines shall have for its object, to furnish such instruction as is provided for in like technical schools of a high grade, and may, by its board of trustees, confer all degrees appropriate to the courses of study pursued."

The school furnishes the instruction through its faculty. In the conferring of degrees, it is represented by its board of trustees. It belongs to the faculty, by whom the instruction is imparted, to say whether a student possesses the proper qualifications to entitle him to a diploma. The necessary examination must, therefore, be conducted by it. It is the school which confers the degree, and the agency through which it acts in so doing is its board of trustees. The board has no power to issue a diploma except when required to do so by the school, speaking through its faculty. In a given case the faculty determines by an examination whether the candidate is

entitled to a degree. In the decision of the question the trustees have no voice. They are bound by the judgment of the faculty, and can act only as the faculty direct.

The plaintiff did not pass the required examination. The complaint charges his failure upon the hostility of the faculty. If the faculty wrongfully deprived him of an advantage to which he was entitled, possibly he had a remedy; but their conduct, whether wrongful or not, gave him no right of action against the trustees.

This suit was instituted to compel the defendants to do something they have no authority to do, and which cannot lawfully be done by them; and the demurrer should have been sustained. See *People v. Medical College*, 20 N. Y. Supp. 379.

The judgment will be reversed. *Reversed.*

September Term, 1902.

[No. 2131.]

THE AMERICAN NATIONAL BANK OF DENVER V. HOEFFER.

1. Conveyances—Easements—Water Rights.

An easement such as the right to use an irrigating ditch to carry water for the purpose of irrigating land will pass as an appurtenance to the land without specific mention in the deed if such was the intention of the grantor, and the deed being silent such intention may be gathered from the presumptions arising from the circumstances surrounding the transaction.

2. Same.

A owned two separate tracts of land and constructed a ditch across one tract to carry water for the purpose of irrigating the other. A conveyed both tracts to S but by separate deeds and at different times and without specific mention of the ditch. S conveyed the tract irrigated by the ditch to H, and several years later conveyed the land across which the ditch was constructed to plaintiff, and H conveyed with all appurtenances the tract so irrigated to defendant. None of the deeds specifically mentioned the ditch. During the ownership of A, S and H the ditch was continuously, openly and visibly used to irrigate the land passed to defendant. Held, that the circumstances surrounding the conveyances raised a reasonable presumption that it was the intention of each of the grantors to convey the easement in the ditch, and under such presumption defendant was the owner of such easement, and that it was error to enjoin defendant from using the same.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. MILTON SMITH,
for appellant.

GUNTER, J.

Arnett owned south half of northwest quarter,
section 8, also lands in section 7. Having water

rights in a canal just east of section 8, for the purpose of applying them in irrigating his land in section 7, he constructed a ditch across the south half of northwest quarter section 8, connecting the canal and the land in section 7, and used it in irrigating last mentioned land. Thereafter he conveyed the land in section 8 to Sullivan, retaining the land in section 7. During the year the ownership of the land was thus held, Arnett, without objection from Sullivan, continued the use of the ditch on section 8 in irrigating the land in section 7. Arnett thereafter conveyed the land in section 7 with its appurtenances to Sullivan, thus uniting in Sullivan the ownership of lands in sections 7 and 8. During his holding of the tracts Sullivan continued to use the ditch in section 8 in irrigating from the canal the land in section 7. Sullivan, July 1891, conveyed the land in section 7 with its appurtenances to Hughes. The latter, throughout the irrigating seasons from 1891 to July 1895 inclusive continued without objection on the part of the owner of the land in section 8, to use the ditch thereon in irrigating his land in section 7. February 1896 defendant succeeded Hughes in the ownership of the land in section 7 and its appurtenances. During the irrigating seasons of 1896 and 1897 defendant has used the ditch in section 8 in irrigating the land in section 7.

Plaintiff, in 1894, succeeded Sullivan in the ownership of the south half of northwest quarter of section 8.

Defendant claimed the right to flow water through the ditch in section 8. This right plaintiff denied, and this action was to enjoin defendant from so using the ditch. Plaintiff had judgment below; defendant appealed.

No appearance here by plaintiff.

An easement such as the one in question may

pass as an appurtenance to the dominant estate without specific mention in the deed conveying such estate. It does so pass provided such was the intention of the grantor. The deed being silent such intention is gathered from the presumptions arising from the circumstances surrounding the transaction.—*Arnett v. Linhart*, 21 Colo. 188; 40 Pac. 355; *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475; *Gelwicks v. Todd*, 24 Colo. 494, 52 Pac. 788; *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020.

Arnett constructed the ditch in question for irrigating the land in section 7 and so used it. During his ownership of the land in section 7 this ditch was a visible, continuous and reasonably necessary appurtenance to the land in section 7. So it was during the ownership of Sullivan and Hughes respectively. Although there is no specific mention of this ditch in their respective deeds it is a reasonable presumption from the facts surrounding the deeds of the respective grantors that each of them intended to convey, and did convey, the easement in question. Under this presumption defendant is the owner of the easement in question and the court below erred in enjoining it from using the same.

In addition to above authorities, supporting this conclusion, are *Tooth v. Bryce*, 50 N. J. Eq. 589; *Howell v. Estes*, 71 Tex. 690; *Baker v. Rice*, 56 Ohio St. 463; *Sanderlin v. Baxter*, 76 Va. 299; *Spencer v. Kilmer*, 151 N. Y. 390.

Let the judgment below be reversed.

Reversed.

[No. 2162.]

THE BOARD OF COUNTY COMMISSIONERS OF GARFIELD
COUNTY V. BEARDSLEY.

1. Costs—County Judges' Fees—Trials—Statutory Construction:

Under the provisions of 3 Mills' Ann. Stats., section 1901, fixing a fee for county judges for each trial or hearing of a cause

in the county court, to be taxed against the losing party, a county judge is not entitled to collect from the county a trial fee in a misdemeanor case disposed of by nolle prosequi.

2. Costs—County Judges' Fees—Claims Against County.

A county judge is not entitled to collect from the county fees and expenses for attending district court to defend the jurisdiction of the county court in misdemeanor cases.

3. Claims Against Counties—Disallowance in Part—Accepting Warrant—Notice—Appeal.

Where a claim against a county was disallowed in part and a warrant was issued for the amount allowed as in full payment of the claim, and the claimant received the warrant without any knowledge that it was conditioned as in full of his claim, he was not precluded from a recovery of the balance of his claim against the county. The fact that he afterwards appealed from the action of the board disallowing part of his claim is not of itself sufficient to charge him with knowledge of the condition attached to his acceptance of the warrant.

Appeal from the District Court of Garfield County.

Mr. C. W. DARBOW, for appellant.

WILSON, P. J.

The plaintiff, Beardsley, judge of the county court of Garfield county, presented to the defendant commissioners for allowance certain bills for fees and costs taxed in misdemeanor cases pending in his court. The aggregate amount was \$150.00. The bills were allowed to the total amount of about \$110.00, and various items aggregating about \$39.00 were disallowed. A warrant was drawn for the \$110.00 and was received by the plaintiff. Shortly after this he appealed from the decision of the board upon the items disallowed. Upon appeal the district court allowed the rejected items to the amount of \$25.00, and disallowed the remainder. The question before this court is whether several items which were allowed by the district court are proper charges against the county.

Two of these items were in the sum of four dol-

lars each, charged for the trial or hearing of two misdemeanor cases in which there had been in reality no trial or hearing, the district attorney having entered a *nolle prosequi* in each. It was attempted to sustain this charge under a clause of the fee and salary act which reads as follows: "For each trial or hearing of a cause instituted in the county court for each day actually occupied by him in such hearing or trial, to be taxed as costs against the unsuccessful party in counties of the * * * fourth class, four dollars."—3 Mills' Ann. Stats., sec. 1901, p. 565; Laws 1891, p. 208, sec. 5.

We do not think the charge was a proper one. The evident intent of the statute was to provide that this sum might be taxed as costs to cover the time occupied by the court in the final trial or hearing of a cause. We do not see how this right could accrue—waiving all other questions—in a cause which did not come to trial at all, as was the case here. The *nolle prosequi* of course disposed of the case and so would a dismissal by a plaintiff in a civil suit. It certainly could not be contended in the latter case that the plaintiff must pay costs the same as if his case had come to trial and had been regularly heard. In each it would be proper to tax as costs only what is allowed for the consideration of a motion or the entry of an order of dismissal.

Query—As the language of the statute provides for the taxation of this item of cost against the unsuccessful party only, does it apply at all to other than a civil trial? To the prosecution neither for a crime nor a misdemeanor is the county a party. In such case therefore, even after full trial to a jury, can this cost be taxed against it, and this too, whether the result be acquittal or conviction?—*Boykin v. The People*, 23 Colo. 184.

Another item in the bill was: "To time, labor

and expense in defending jurisdiction of county court in misdemeanor cases involving trip to Aspen to appear in district court, and appearance in district court in Glenwood Springs, \$15.00.” Of this the district court allowed only five dollars, being the amount for expenses alleged to have been incurred. We are not advised by the record as to how the question of jurisdiction arose except that it was in a prosecution for misdemeanor. Neither are we informed why the judge felt called upon to personally appear in the district court and defend his jurisdiction. We can conceive of no circumstances which would require it. In such a case the duty, if any, to defend, would devolve upon the district attorney under the statute. It is sufficient to say, however, that the statute nowhere makes provision for an allowance for compensation for such services, and hence the judge was not entitled to demand it.—*Garfield County v. Leonard*, 26 Colo. 153.

The contention on the part of the county that the plaintiff was precluded from any recovery on the disallowed balance because he had accepted the warrant for the part allowed which had been issued in full satisfaction of his claim, is without force under the circumstances of this case. It does not appear that the plaintiff had knowledge of the condition upon which the warrant had been issued at the time he received it, nor are any facts shown from which such knowledge may be presumed. The mere fact that he subsequently appealed from the action of the board with reference to the disallowance of a part of his claim does not establish this knowledge. Because he appealed it does not necessarily follow that he knew the condition attached to the acceptance of the warrant was that it should be in satisfaction of the entire claim. Even if it were, he might have obtained this knowledge after he had accepted the warrant, and

before he gave notice of appeal. The case therefore does not come within the rule recognized by both of our appellate courts.—*Board of Commissioners of La Plata County v. Durnell*, 17 Colo. App. 85, 66 Pac. 1073; *Board of Commissioners of La Plata County v. Morgan*, 28 Colo. 322, 65 Pac. 41.

For error in allowing the items of charges mentioned the judgment of the district court must be reversed.

Reversed.

[No. 2159.]

THE BOARD OF COUNTY COMMISSIONERS OF HINSDALE
COUNTY V. CRUMP.

1. District Attorneys—Assistants—Power of Court to Appoint—
Compensation—Claim Against County.

The district court has inherent power, in the exercise of a proper discretion, to appoint counsel to assist the district attorney in the prosecution of criminal cases, subject to review in the appellate courts for the abuse of such discretion, and such assistant is entitled to compensation for his services to be paid by the county charged with the payment of the expenses of such prosecution.

2. Same—Value of Services—Allowance by Court—Evidence.

Where counsel was appointed by the district court to assist the district attorney in the prosecution of a criminal case, an allowance by the court of compensation to such counsel for his services is at least prima facie evidence of the value of the services.

3. Same—Verification of Claim.

Where counsel was appointed by order of the district court to assist the district attorney in the prosecution of a criminal case and an allowance made by the court for his services, in presenting the claim to the board of county commissioners for allowance, it is not necessary that it be verified by the affidavit of the claimant, but the claim is sufficiently proven by a certified copy of the order making the appointment.

4. Claims Against County—Action by Board of County Commissioners—Suit.

It is not a valid objection to a suit against a county, that it was brought before the commissioners had finally acted on the claim, where between the time of filing the claim with the

commissioners and the bringing of the suit eight meetings of the board of commissioners had been held.

5. Claim Against County—Assistant District Attorney—Pleading—Amendment—Departure.

Where counsel was appointed to assist the district attorney to prosecute a criminal case and brought an action against the county to recover compensation for his services and alleged in his original complaint that he was appointed and acted as "special prosecutor" in the case mentioned, an amendment by interlineation by striking out the words "special prosecutor" wherever they occurred and inserting instead "to assist the district attorney" was not a departure from the original cause of action.

Appeal from the District Court of Hinsdale County.

Mr. G. D. BARDWELL and Mr. W. A. BYAL, for appellant.

WILSON, P. J.

At the beginning of a trial for murder the district attorney suggested to the court that by reason of the importance of the case he needed assistance in its prosecution and requested the appointment of counsel for that purpose. Thereupon the court appointed plaintiff Crump, a qualified and licensed member of the bar, who accepted and acted at the trial as such assistant. At the conclusion of the trial the court made an order directing that he be allowed the sum of two hundred dollars as compensation for his services, and that said amount be paid by Hinsdale county.

That the district court in this state has the power to appoint counsel to assist the district attorney in criminal trials cannot, we think, be questioned either on reason or authority. The exercise of such power is not prohibited by statute, and belongs to the court independent of any express statutory grant or sanction. It is one of the inherent powers of a court of general jurisdiction, charged with the duty of ad-

ministering the law and securing a fair trial not only for the defendant, but for the people of the state. It is a power which the interests of public justice require to be vested in the court. The nonexistence of the power might sometimes lead to the miscarriage of justice and facilitate the escape of offenders guilty of heinous crimes and who justly merit punishment. The exercise of the power is of course discretionary with the court, and this discretion is subject to review in the appellate tribunals as in other cases.—*Tull v. The State*, 99 Ind. 238, 31 Central Law Journal, 344.

In this case no abuse of discretion is made to appear. It is not necessary further to discuss the reason upon which the rule is founded, because it has been expressly recognized and settled by a prior adjudication of this court.—*Raymond v. The People, etc.*, 2 Colo. App. 349.

The principle upon which this rule is based has been recognized and affirmed by our supreme court. The statutes of the state expressly provide for the appointment of a special attorney in criminal cases to act for and in place of the district attorney in certain specified contingencies, but our supreme court has held that the power of the district court to make such an appointment is not limited to the contingencies specified in the statute. It is within the inherent power of the court to appoint in other cases where necessary in the furtherance of justice, and for the due administration of the law.—*Roberts v. The People*, 11 Colo. 215; *The People ex rel. Lindsley v. District Court*, 29 Colo. 5, 66 Pac. 896.

The court having power to appoint an assistant to the district attorney it necessarily follows that such assistant is entitled to compensation for his services to be paid by the county, which is charged with the payment of the expenses of the prosecution in a

criminal trial. It is true that the statute does not make express provision for the payment of such compensation nor prescribe the amount of it, but the same might be said of other expenses which are sometimes necessarily incurred in a criminal trial. All cannot be foreseen, and it might seriously interfere with criminal prosecutions if the court charged with the duty of hearing them had not the power to provide for these unforeseen contingencies. An attorney is an officer of the court, but the court would have no right to compel him by its order to bestow his time, learning and labor in some matter without his being entitled to reasonable compensation therefor. Claims may and often do arise against a county of which the county commissioners are required to take cognizance which do not arise from any contract with the county, but which grow out of some duty imposed by law or from the act of some officer who is authorized and required by law to do certain things, in the doing of which an obligation may be created against the county not expressly provided for by statute.—*Tull v. The State, supra; Montgomery County v. Courtney*, 105 Ind. 313.

It has been held in some jurisdictions that in cases where the statute makes no provision for the appointment of counsel to appear for pauper defendants and for their payment, the trial court may, however, appoint, and the appointee is entitled to compensation for his services to be paid by the county or by the state if it be chargeable with the expenses of criminal trials.

In *County Commissioners v. Lee*, 3 Colo. App. 181-182, cited by defendant, the question was as to the power of the trial court to allow to a witness a greater compensation than that fixed by statute. Even in that case it was impliedly conceded that the court might have under some circumstances the inherent

power in criminal prosecutions to contract liabilities for which the county would be responsible. It was held, however, that the case there presented did not come within the rule, or rather exception to the general rule, because it had not been shown and did not appear that the making of the order there in question had been necessary or essential "to the safe or successful administration of justice."

It is conceded that the county commissioners have the power to employ and compensate from the county funds counsel to assist in criminal prosecutions. How much better prepared is the court in which the trial is to be had than the commissioners to determine when assistant counsel is needed and should be employed.

Whether the allowance by the district court for the services is conclusive as to the amount upon the commissioners, it is unnecessary for us to decide, because in this case the order of the court fixing the compensation was presented to the commissioners by the plaintiff as a claim in his behalf for allowance, and they did not undertake to allow any lesser amount, in fact, took no action upon it at all. Whether the order of the court be conclusive or not as to the amount, it is certainly under the authorities at least *prima facie* proof of the value of the services.—*Commissioners v. Pollard*, 17 Ind. App. 474.

We see no force in the objection that the claim as presented to the commissioners was not verified, even if true, as to which we see no evidence in the abstract. The services having been rendered by order of the district court, we think that a certified copy of this order from the court of record by whose express order the expense was incurred, did not come within the requirement of the statute that a personal claim or account against the county presented for allowance should be verified. The obligation grew wholly out

of that order, and the services were rendered in court. It would seem that this order or a certified copy of it should of itself be sufficient proof—which is the object of verification—to the county commissioners that the services had been rendered. It appears that the board entertained the claim, making no objection because of want of verification, and the statute does not prohibit the allowance of unverified claims.

That this suit was brought before the commissioners had finally acted upon the claim can avail defendant nothing, because it appears that between the time of the filing of the claim or order and the bringing of the suit, eight meetings of the county commissioners had been held. Plaintiff had a right to assume under such circumstances that the claim had been disallowed.

After the trial had commenced, the court allowed the plaintiff to amend his complaint by interlineation, and defendant urges that this amendment constituted a departure, setting up an entirely different cause of action from that stated in the complaint. The original complaint alleged that the court “appointed plaintiff as special prosecutor or prosecuting attorney to represent the people in the case of The People of the State of Colorado, plaintiff, and John Halpin, defendant, said case being a prosecution for murder, and that pursuant to said appointment plaintiff did act as special prosecutor for and on behalf of the people aforesaid, etc.” The amendment was the insertion of the words, “to assist the district attorney,” in place of the words, “as special prosecutor,” where they occur after the word “plaintiff.” Under the rule, well settled in such cases, the amendment was not a departure.—*R. R. Co. v. Cahill*, 8 Colo. App. 164; *Messenger v. Northcutt*, 26 Colo. 529.

There was no abandonment of the cause of action as stated in the complaint in any essential particular,

or in fact, as we view it, in any particular. A recovery upon the original complaint would undoubtedly have barred a recovery in a suit upon the complaint as amended. The cause of action in either case was the rendering of legal services as special counsel under appointment of the court in the prosecution of the case. Although the plaintiff may have assisted the district attorney, he was none the less a special counsel and a special prosecutor. The original complaint did not, as defendant contends, state a cause of action based upon the statute allowing the court in certain contingencies to appoint a special prosecutor or a special counsel to act for and in place of the district attorney. The complaint will bear no such construction.

The judgment will be affirmed. *Affirmed.*

[No. 2168.]

THE BOARD OF TRUSTEES OF THE TOWN OF MONTROSE
V. ENDNER.

1. **Mandamus.**

Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.

2. **Mandamus—Pleading—Cities and Towns—Appropriation.**

A petition for a writ of mandamus to compel the board of trustees of an incorporated town to allow a claim of the petitioner against the town for coal furnished to the town and to order a warrant drawn for its payment which fails to allege that a previous appropriation had been made concerning such expense is fatally defective.

Appeal from the District Court of Montrose County.

Mr. F. D. CATLIN, for appellants.

Mr. S. S. SHERMAN, for appellee.

THOMSON, J.

Proceeding in mandamus to compel the board of

trustees of the town of Montrose to allow a claim of the petitioner against the town, and order a warrant drawn for its payment. The petition, filed July 11, 1899, alleged that the town was the owner of its own water works, and, during the month of September, 1898, purchased and received coal from the petitioner to be used in their operation, for which it promised to pay him the sum of \$84.06 at the first meeting of the board after the month of the purchase; that at the first regular meeting of the board in October, 1898, the petitioner presented to the respondents his bill for the coal, to be allowed and paid, but, although he had frequently demanded its allowance and payment, the respondents had taken no action upon it; that the monthly revenue derived from the water works was more than sufficient to defray the expenses of their operation, and that since the presentation of the petitioner's claim the respondents had allowed and paid other claims out of the revenue from the water works. The respondents demurred to the petition for insufficiency; and, upon the overruling of their demurrer, answered, denying that they or any of them agreed to pay the petitioner for any coal, the sum of \$84.06, or any other sum, either at their first meeting in October, or at any other time; denying that any demand was ever made upon them for the allowance or payment of the petitioner's bill; denying that the bill was payable out of funds furnished by the operation of the water works, and denying that there were any such funds. The cause was heard on the petition and answer, and a peremptory writ ordered, commanding the respondents to take action on the claim at their next meeting.

Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.—Mills' Ann. Code, sec. 307. We have been referred to no law specially

enjoining upon the respondents the duty of allowing or paying the petitioner's claim. The powers and duties of city councils and boards of town trustees, are specifically enumerated by the statute; but among those duties is not that of auditing claims.

However, it is not necessary that we should express ourselves definitely at this time on the question of the respondents' duty in the matter of passing upon this bill, for in another particular the petition is fatally defective. The corporation was prohibited by law from contracting the debt, or incurring the expense mentioned in the petition, unless a previous appropriation with reference to it had been made.—Mills' Ann. Stats., secs. 4447, 4448, 4449. Without such appropriation there is no way in which the petitioner's claim can be enforced.—See *Sullivan v. Leadville*, 11 Colo. 483.

It was incumbent upon the petitioner to set forth in his petition every fact necessary to entitle him to the writ, and as the liability of the corporation was dependent upon a previous appropriation, an averment of such appropriation was necessary. In *State v. Governor*, 39 Mo. 388, Wagner, J., said:

“It is a familiar rule of pleading that the plaintiff must state in his petition all the facts specifically, which would be necessary, if true, to entitle him to maintain his action, or to have the relief which he seeks.”—See also High's Ex. Rem., § 450; Merrill on Mandamus, § 255.

Upon the facts set forth in the petition, the respondents were not required to take any action of any kind upon the petitioner's claim, and the writ was erroneously ordered.

The judgment is reversed.

Reversed.

[No. 2156.]

**BALLARD V. THE BOARD OF COUNTY COMMISSIONERS OF
PHILLIPS COUNTY.**

Opinion Followed.

This case is affirmed on the opinion in the case of *Chapman v. The Board of Commissioners of Phillips County*, 17 Colo. App. 236.

Error to the County Court of Phillips County.

Mr. W. D. KELSEY, for plaintiff in error.

Mr. J. S. BENNETT, for defendant in error.

WILSON, P. J.

The facts are the same and the same questions are involved as in a case decided by this court at its recent January term.—*Chapman v. Board of Commissioners of Phillips County*, 17 Colo. App. 236, 68 Pac. 134.

Ballard, the plaintiff in this, was the assignee of Chapman, who was the plaintiff in the other. Suit in each case was to recover a part of the salary alleged to be due to Chapman by Phillips county, as superintendent of irrigation for water division number one. The controlling issue to be determined in each case was whether Phillips county was embraced within the limits of water division number one, as defined by statute. This there was an entire failure to show, in fact, all of the evidence introduced was to the contrary. It did not appear that any lands in Phillips county were irrigated by water from any of the streams mentioned in the statutes defining the limits of the district or division.

For this reason the judgment will be affirmed.

Affirmed.

[No. 2164.]

**THE SCOTTISH UNION AND NATIONAL INSURANCE
COMPANY V. FIELD, TRUSTEE.**

**Fire Insurance — Mortgage Clause — Appraisement — Rights of
Mortgagee—Pleading.**

A policy of fire insurance containing the union mortgage

clause was issued on a building covered by a deed of trust and was assigned as collateral security to the trustee as additional security to the mortgage debt. The policy also provided that in case of loss or damage the value should be ascertained or estimated by the insured and the insurance company. In an action on the policy by the trustee for the loss caused by the destruction of the building by fire, the plaintiff was not bound by an agreement between the company and the insured as to the amount of the loss, and a demurrer was properly sustained to an answer setting up such agreement at a less sum than the face of the policy and making tender of such agreed sum.

Error to the District Court of Garfield County.

Mr. S. A. OSBORN, for plaintiff in error.

Messrs. VAN NESS & REDMAN, of counsel.

Messrs. BLACKMER & McALLISTER, for defendant in error.

GUNTER, J.

One Hubbard owned improved real estate; gave a trust deed thereon to secure an indebtedness, \$1,150; took a policy on the improvements, a building, and assigned it as collateral for above debt. The policy insured Hubbard in the sum of \$700 against loss of the building by fire and provided:

“This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value. * * * Said ascertainment or estimate shall be made by the insured and this company, * * *.”

Also contained the union, or standard, mortgage clause, the pertinent part of which is:

“It is agreed that any loss or damage that may occur under this policy shall be payable to Kirk H. Field, trustee, * * * as interest may appear, and that this insurance as to the interest of said trustee shall not be invalidated by any act or neglect of the grantors in the * * * trust deed.”

The building was destroyed by fire, and the trustee sued to recover the amount of the loss, \$700. The answer set up that after the loss said Hubbard and the defendant agreed upon the amount thereof as \$375, and it made tender of such amount. To review alleged error in sustaining a demurrer to such defense, is this proceeding.

Was the trustee bound by the act of the owner Hubbard in so fixing the amount of the loss? That he was not, the authorities are agreed.

In *Hastings et al. v. Westchester Fire Ins. Co.*, 73 N. Y. 141, plaintiffs, as collateral to a debt secured by mortgage, held an insurance policy endorsed payable to them in case of loss, and further endorsed, "It is hereby specially agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured * . * .". The policy also contained this provision, "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon * * * ." Prior to the insurance of the policy held by plaintiffs the owner unknown to plaintiffs had taken out other insurance on the property covered by the mortgage. Loss occurred, and plaintiffs sued on the policy held by them for the full amount provided therein. Defendant company set up the other insurance, claiming that the amount of loss should be pro rated with the other company carrying insurance, and that a recovery against it should be abated accordingly. Plaintiffs contended that under the union mortgage clause they were unaffected by the act of the mortgagor in taking out other insurance, and that the contribution

clause was therefore not applicable to them. Their contention prevailed, the court saying *inter alia*:

“The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees, and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had been to the owner, and the additional provisions, which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. * * * The mortgage clause * * * created an independent and new contract, which removes the mortgagees beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest separate from the owner, embraced in another and different contract.”

In *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439, P. gave his note and to secure same trust deed on real estate. He also took an insurance policy containing the above union mortgage clause and the contribution clause, in case of other insurance and loss; also a provision for an appraisement of the loss by agreement between the mortgagor and the company. Later P. took out other insurance. Loss occurred. Trustee Olcott sued on the policy. Defendant company set up as a defense the provision as to contribution and appraisement of the loss by agreement between said P. and the company. Both defenses were disallowed, the court in the course of the opinion saying:

“The next question is, * * * is the * * * bank bound by the acts of P. and his wife in obtaining to themselves and for their own benefit the four

additional policies of insurance, and in submitting the question of the amount of damages to appraisers? If it is thus bound it is manifest that notwithstanding the bank had a separate and distinct legal interest in the insurance, that interest might be so impaired by the acts of P., over whom it had no legal control, as to be practically worthless. * * * The mortgage clause distinctly recognizes, as we have before seen, an interest separate from that of P. in the insurance, and that this interest is for the security of the holder of the note, whoever he may be.

* * * In effect there are two distinct contracts of insurance; one by the mortgagor, the other by the mortgagee, and this view gives full force to all the language, and none other will. * * * We perceive no reason for holding as contended by counsel for appellant, that the word 'invalidate' should be held to mean a forfeiture of the policy for every purpose, and not simply its impairment. The same reason existed for not allowing it to be thus impaired, as totally forfeited. * * * The same reasoning which shows that the bank is not to be affected by the act of P. in obtaining the additional insurance also shows that it is not to be affected by his act in submitting the question of loss and damage to the appraisers. By such act no more than by the other could he 'invalidate' the insurance as to the interest of the bank therein."

See also *Five Cents Savings Bank v. Penn. Ins. Co.*, 122 Mass. 165; *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 17 L. R. A. 514; *Eddy v. London Assurance Corporation*, 143 N. Y. 311, 25 L. R. A. 686; *Syndicate Ins. Co. v. Bohn*, Circuit Court of Appeals, Eighth District, 65 Fed. 165.

Last cited case in speaking of *Hastings v. Insurance Co.*, says: "That decision had settled such a clause (union mortgage clause) protected the mort-

gagee against any act or neglect of the mortgagor, whether prior or subsequent to its issue. That decision had been repeatedly approved by courts of high rank, and never disapproved." Therein it is further said: "Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause."

Authorities cited by plaintiff in error are not upon facts similar to those herein involved. We know of no authority in conflict with the conclusion here reached.

Plaintiff in error, here for the first time, urges that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege that Hubbard, the owner of the property at the time of the insurance, sustained loss by fire. This fact was not necessary to plaintiff's recovery, therefore not necessary to prove or allege.—*Syndicate Ins. Co. v. Bohn, supra.*

Judgment affirmed.

Affirmed.

[No. 2167.]

KINCAID ET AL. V. PRICE ET AL.

Sales—Breach of Contract to Buy—Measure of Damage—Market Price—Cost of Production—Instructions.

In an action for damages for breach of contract to purchase the output of a coal mine, if the output of the mine could have been sold in the market at a price above the cost of production

18	73
388	233

the measure of plaintiff's damage would be the difference between the price agreed to be paid by defendant and the market price. And in the absence of a showing that there was no market value, an instruction that the measure of damage was the difference between the contract price and the cost of producing the coal named in the contract was erroneous.

Appeal from the District Court of Fremont County.

Mr. CHARLES E. WALDO and Mr. CLYDE C. DAWSON, for appellants.

Mr. A. MACON and Mr. JES. H. MAUPIN, for appellees.

GUNTER, J.

Plaintiffs agreed to sell and deliver defendants the output—with an immaterial exception—of their coal mine, which defendants were to accept and pay for at a stipulated price; the coal to be merchantable lump and nut; contract to run for two years. The gist of the contract was, plaintiffs to sell and deliver and defendants to accept and pay for certain coal. After receiving coal about four months defendants declined to take further. Plaintiffs claimed a breach of the contract and sued for damages. Defendants, among other defenses, denied that plaintiffs had sustained damage. Verdict and judgment were for plaintiffs. Defendants appealed. On trial this instruction was given:

“If the jury shall find in this case a verdict in favor of the plaintiffs, the measure of their damages is the amount of coal of the quality and character provided for in the contract which they were able, ready and willing to produce and furnish to the defendants during the term of the existence of said contract, operating their mine in the ordinary and usual way in which properties of that sort are commonly operated, over and above enough such coal to supply the demand of the local market, also over and

above the amount of such coal which plaintiffs did or might with the exercise of reasonable good faith and diligence have sold to other parties at a price equal to that named in the contract.

“If under this instruction you shall find that the plaintiffs were thus able, ready and willing to furnish any amount of coal under the contract to the defendants, the difference between the contract price therefor and the cost of producing the same, that is, the cost of producing the particular coal which was to be furnished under the contract, will be the measure of damages which the plaintiffs have sustained, if any, by reason of the defendants’ violation of the contract herein sued upon.”

Defendants (appellants) contend that the general rule for measuring damages in actions therefor upon breach of an executory contract—as this—is the difference between the market value of the article contracted to be delivered and the price agreed to be paid therefor; that to justify another rule it should appear from the evidence that the article covered by the contract had no market value; that in this case the court erred in assuming that the article in question had no market value, and in departing the general rule for measuring damages in like cases.

It is, and ought to be, the intent of the law in cases such as this to indemnify the parties injured for damages sustained by the breach, but this should be done without unnecessary prejudice to defendants. Further, it is the duty of the party injured to make every reasonable effort to avert damage from the breach.

“The statement that the fundamental principle of the law of damages is complete compensation to the party injured seems to ignore, in terms at least, just consideration of the rights of the party sought to be held responsible for the damages suffered. It has

been declared, however, that the rules of law respecting the recovery of damages must be applied with reference to the just rights of both parties—not merely what it might be right for an injured party to receive to afford compensation for his injury, but also what it is just to compel the other party to pay.”—8 Am. and Eng. Ency. of Law, 2d ed., 546.

“As has already been seen, compensation is the basic principle of the law of damages, the measure thereof being limited and controlled and the elements of recovery primarily determined by this fundamental consideration. All the rules which have been laid down and applied by the courts in this connection have been formulated and adopted with the view of compensating in money a party injured by the wrong of another, as fully as a just consideration of the rights of the latter will permit.”—8 Am. and Eng. Ency. of Law, 2d ed. 627, 632.

“The party who is exposed to loss by the violation of the contract by another party must exert himself to make the damages as light as possible; the law imposes this active duty upon him.”—*Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553, 558.

“The law imposes upon the party injured by another’s breach of contract, or tort, the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible.”—Sutherland on Damages, vol. 1, 2d ed., § 88; *Id.*, vol. 2, § 648.

“It is the market price, when there is one, at the date of the breach, which governs in the estimate of damages.”—Sutherland on Damages, vol. 2, § 652.

“Where the general rule concerning the market price applies the jury cannot give damages in excess of it. * * *”—Sutherland on Damages, *supra*.

If the plaintiffs in the present case by making

a reasonable effort could have sold the output of their mine in the market at a price above the cost of production then they sustained no greater damages than the difference between such market price and the price at which defendants contracted to take the coal, and no greater damages should have been awarded them. By the application of such a rule to the damages recoverable by plaintiffs herein they would have been fully compensated for the loss through the breach of the contract by defendants, and yet have imposed upon defendants no unnecessary burden. Such should have been the rule given by the trial court for measuring the alleged damages of plaintiffs unless it appeared from the evidence that the coal contracted for had no market value. Whether it had such value was a question of fact for the jury. The rule laid down by the trial court, while it might work full compensation to plaintiffs, might do more, and in doing so impose an unnecessary burden upon defendants—that is, cause them to pay more than was necessary to compensate plaintiffs for the loss. The court charged the jury that plaintiffs should recover the difference between the cost of production of the coal and the price at which the defendants agreed to take it. There was evidence that this difference was about 66 cents per ton; there was evidence that the coal could have been sold in open market about 25 cents above its cost of production. If such facts were true plaintiffs could have saved themselves 25 cents per ton of the damages sustained through the breach of the contract, and have saved defendants in like amount. If they could have done so their alleged damages should have been abated accordingly. Under the instruction given plaintiffs could have recovered from defendants the difference between the cost of production and the contract price of the coal, and as the plaintiffs re-

tained the coal they could thereafter mine and sell the same at 25 cents per ton more than the cost of production, and thus through their judgment and the proceeds of the sale of the coal be more than compensated for the damages sustained by the breach of the contract. Such is not the intent of the law.

Before the court in this case laid down any other rule for the measure of damages than the difference between the contract price and the market value at the time of the breach, it should have appeared from the evidence that there was no market value. This reasonable conclusion is sustained by the authorities. In *Todd v. Gamble*, 74 N. Y. Sup. Ct. Rep. 38, plaintiffs, engaged in the manufacture of silicate of soda, contracted to sell defendants, and defendants agreed to receive and pay for, all the silicate of soda which defendants should use in their business. Defendants declined to receive the soda; plaintiffs sued for damages. Therein the court said:

“In this case the court ruled that the measure of the defendant’s liability was the difference between the contract price and the cost of production,
* * * The defendants requested the court to rule and charge that the burden was on the plaintiffs to show that the silicate of soda had no market value before evidence of the cost of production could be received or considered by the jury, which was also refused and an exception taken. * * * The burden was on plaintiffs to show that the article had no market value, and under the state of the evidence disclosed by the record, whether it had or had not such a value, was a question of fact for the jury, and not one of law for the court. In *New York and Maine Granite Paving Company v. Howell* (7 N. Y. St. Rep. 494) damages were sought to be recovered from a vendee for refusing to accept paving granite. The plaintiffs insisted that the actual value of the goods was to be

ascertained by proving the cost of production, while the defendants contended that their market value was proof of actual value. The trial court held, as a matter of law, that the granite had no market value, and refused to submit that question as one of fact to the jury, which was held to be error."

This case was again considered in 84 N. Y. Sup. Ct. Rep. 569, and in 148 N. Y. 382. The doctrine, however, announced in 74 N. Y. Sup. Ct. Rep., *supra*, was modified. See also Benj. on Sales, 7th ed. (Am. Note), p. 793; also *Dolph v. Troy L. M. Co.*, *supra*, wherein it is said:

"The error of the instructions in the present case consists in adopting these expressions literally and applying them to a case where the difference between the cost price and the contract price would exceed the plaintiff's actual prospective loss, and allow him more than complete indemnity for the breach of the contract by the defendant. In the cases where damages have been sanctioned upon the basis of the difference between the contract price and the actual cost to the plaintiff of performance of the contract, there was no other criterion for ascertaining the extent of the plaintiff's prospective loss."

Where a different rule than the difference between the market value and the contract price has been adopted the article involved has had no market value, and the absence of a market value is the reason announced for departing the general rule. This was true in the leading case of *Masterton v. The Mayor*, 7 Hill 69. See comments thereon in *Dolph v. Troy L. M. Co.*, *supra*.

In *The Silkstone and Dodsworth Coal and Iron Co. v. Joint-Stock Coal Co.*, 35 L. T. N. S. 668, plaintiff contracted to deliver defendant coal. Defendant declined to receive. In an action for damages, as it appeared, there was no market value for that par-

ticular kind of coal at the mouth of the shaft, the place of delivery, the court laid down as a rule for measuring damages the difference between the amount of the expenditure of plaintiff in raising the coal added to the value of the coal had it remained unraised and unsold in the mine, and the contract price per ton which the plaintiff would have received for the coal had the contract been duly performed.

There was no evidence in the present case that the coal involved was without market value; there was positive evidence that it had such value. The court erred in assuming that it had no market value, and in adopting any other rule for measuring the damages than the difference between the contract price and the market value at the time of the breach in the absence of it having been shown and the jury having found that the coal was without market value. If the coal contracted to be delivered was without market value then it was incumbent upon the court to adopt some other rule than the difference between the market value and the contract price for measuring the damages which would compensate plaintiffs for their alleged loss and yet would impose upon defendants no unnecessary burden, observing the requirement that plaintiff should make every reasonable effort to escape injury from the alleged violation of the contract.

The judgment should be reversed.

Reversed.

[No. 2166.]

THUNBORG V. THE CITY OF PUEBLO.

1. Cities and Towns—Negligence—Public Streets.

Where a fireplug, very near the beaten roadway of a street and at a point in the roadway where vehicles could not pass without one turning out of the beaten way was permitted to become concealed by growing weeds and vegetation, and the city had knowledge of the condition which rendered the fireplug

dangerous to travelers on the street, the city was guilty of negligence in permitting vegetation to conceal the plug and is liable for injuries to a person caused by his vehicle coming in collision with said fireplug without any negligence on his own part while driving along the street.

2. Same—Contributory Negligence—Instructions.

In an action against a city for injuries to plaintiff caused by his vehicle while driving along a public street coming in contact with a concealed and dangerous fireplug, where defendant claimed that the injury was the result of plaintiff's own negligence in driving along the street at a furious and unlawful rate of speed, an instruction that if the jury found from the evidence that plaintiff was traveling at a furious and rapid rate of speed and that such act was the cause of the injury it was immaterial whether such traveling was intentional or the result of his inability to restrain his horse he was guilty of contributory negligence and could not recover, was erroneous.

Error to the District Court of Pueblo County.

Mr. M. J. GALLIGAN, for plaintiff in error.

Mr. GEO. W. COLLINS, for defendant in error.

THOMSON, J.

C. A. Thunborg brought this action against the city of Pueblo to recover damages for injuries sustained by him on June 24, 1898, by coming into collision with a hydrant, or fire plug, hidden by weeds and sagebrush, while driving along Court Street, a public street of the city, in the evening. The complaint charged negligence against the city in suffering a growth of weeds and brush to conceal the fireplug, and alleged want of knowledge in the plaintiff of its existence. The answer denied negligence on the part of the city and alleged that the street was but little used and that the plaintiff was guilty of contributory negligence in driving at a furious and unlawful rate of speed. The defendant had judgment and the plaintiff appealed.

The following facts appeared from the evidence:

The street was a public and much-used thoroughfare, The fire plug was but a few inches from the beaten roadway, which deviated towards it to avoid a puddle of mud, and was concealed by a thick growth of weeds and sagebrush. The same conditions had existed there for at least three years previous to the accident, the weeds being renewed every spring, and the sagebrush remaining constantly. The injuries received by the plaintiff were severe and permanent. It was dark or nearly dark when the accident occurred. The plaintiff testified that on the evening of the accident he was returning to his home in a cart; that when nearly opposite the fireplug, which he had never seen and the existence of which he did not suspect, he saw another vehicle approaching him in the roadway which he could not pass except by entering the weeds and brush; that to avoid a collision he turned to the right into the weeds and brush, struck the fire plug and was thrown to the ground, and that when approaching the place where the fire plug was located his horse was going at an ordinary trot. It was testified that in the previous summer another person meeting a team in the same locality turned into the weeds and brush to avoid it, struck the fire plug and broke his buggy, and that at still another time at the same place there was a narrow escape from the same kind of accident.

Mr. E. Settles, the man in the buggy which the plaintiff turned out of the road to avoid, stated that he heard the rattle of the plaintiff's cart; that it seemed to him from the great noise the cart was making that some one was driving very fast, or that the horse was running away; that it was nearly dark and he could not see whether the horse was trotting or loping; that when almost opposite to him the plaintiff left the road and struck the fire plug, and that he went to the plaintiff and asked him why he was

driving so fast and the plaintiff answered that he was driving a new horse and could not hold him. Witness also stated that the plaintiff was very much stunned by the fall. Two members of the police force of the city, who took the plaintiff to the hospital, said he told them that his horse was running away at the time of the accident. They also said he was suffering frightful pain. In rebuttal it was shown that owing to the play of the spokes in the hubs the plaintiff's cart which was very old, was extremely noisy.

The fire plug was lawful and necessary in the place it occupied, yet by reason of its being concealed from view it became a menace to the safety of travelers. It appears that it was very close to the edge of the beaten roadway and that a vehicle passing at that point could be avoided only by turning towards it, and this, one having no reason to suspect that he would encounter anything more dangerous than weeds or sagebrush, would not hesitate to do. The plaintiff being lawfully on the street, for the purpose as he supposed of preventing a collision, turned his horse into the harmless-appearing growth of vegetation with the result that he suffered permanent injury. That the city had actual or implied knowledge of the existence of the conditions which rendered its fire plug dangerous to travelers is not disputed, and we think its negligence was established beyond question. If, however, as to the question of the city's negligence, it could be said that the evidence left room for a difference of opinion, the court's third instruction, which was given by consent, contained a fair statement of the law, and in so far as other instructions were inconsistent with it, they were erroneous.

But while, respecting the duty and responsibility of the city in relation to the cause of the ac-

cident, the court correctly declared the law, on the question of contributory negligence it committed fatal error. In submitting that question to the jury the following language was used:

“The jury are further instructed that if they find from the evidence that the plaintiff was traveling at a furious and rapid rate of speed and that such act on his part was the cause of the injury and that he would not have suffered the same had he been driving at an ordinary and prudent rate of speed, then it is immaterial so far as this defense is concerned whether his so traveling was intentional on his part or the result of his inability to restrain his horse.”

Negligence is want of care. It consists in omitting to do something which should be done, or inconsiderately doing something in an improper manner. The term supposes the ability to do the thing omitted or to do the thing undertaken properly. It cannot be applied to an act or omission which is compulsory.

There was no proof of rapid or furious driving by the plaintiff. The only evidence warranting a supposition that the horse was exceeding his ordinary speed is found in statements of the plaintiff made when stunned by the fall, and, according to the same evidence, the horse was at the time, beyond control. If the horse was going excessively fast, it is quite material whether the plaintiff was able to restrain him or not; for unless the plaintiff was himself responsible for the immoderate speed it constitutes no defense to the city.—*Denver v. Johnson*, 8 Colo. App. 384; *Crawfordsville v. Smith*, 79 Ind. 308; *Ring v. Cohoes*, 77 N. Y. 83; *Baldwin v. Turnpike Co.*, 40 Conn. 238.

Let the judgment be reversed.

Reversed.

[No. 2182.]

ASHWORTH V. MCNAMEE ET AL.

Wills—Contests—Evidence.

In a trial in the district court on appeal from an order of the county court probating a will the contestant is not limited to the testimony of the subscribing witnesses of the will, but is entitled to introduce any competent testimony as to the mental capacity of the testator.

Appeal from the District Court of Arapahoe County.

Mr. WM. T. ROGERS and Messrs. MCINTYRE & BRAY, for appellant.

GUNTER, J.

Probate of a will was granted by the county court and appeal taken therefrom by the contestant to the district court. Upon retrial there contestant offered to prove by witnesses other than those attesting the will "that the testator was not at the time of executing said will of sound mind and disposing memory." This offer the court refused, and therein erred. The contestant was not limited to the testimony of the subscribing witnesses of the will, but was entitled to introduce any competent testimony to the mental capacity of the testator.—*In re D'Avignon's Will*, 12 Colo App. 489, 55 Pac. 936.

No opinion is expressed upon the remaining question presented.

Let the judgment be reversed.

Reversed.

[No. 2057.]

STATTON, AS COUNTY TREASURER, V. THE PEOPLE
EX REL.**1. Tax Sales—Liens—Personal Tax.**

Where land is sold for taxes assessed against the land and also for personal taxes assessed against the owner, the certificate of purchase invests the purchaser with a lien for the

taxes assessed against the land superior to all liens, and also with a lien for the amount paid on account of the personal taxes of the owner, which is subject to prior liens.

2. Same—Redemption—Mandamus—Equity—Parties.

Where land covered by a deed of trust was sold for taxes part of which were assessed against the land and part of which were assessed as personal tax of the owner, in a proper proceeding the beneficiary of the trust deed is entitled to a release as to his interest in the land from the tax sale by payment only of the amount properly chargeable against the land, but mandamus will not lie against the county treasurer to compel him to release said land from the tax sale except upon payment of the entire amount for which it was sold with interest and penalties. The proper remedy would be a proceeding in equity against the holder of the certificate of purchase.

*Appeal from the District Court of Rio Grande
County.*

On Rehearing.

Mr. CHARLES M. CORLETT, for appellant.

Mr. JESSE STEPHENSON, for appellee.

THOMSON, J.

On the 9th day of July, 1892, Clarkson A. Pound executed a deed conveying certain real estate of which he was the owner to a trustee to secure the payment of an indebtedness from him to Almira S. Burr. This deed was duly recorded on the 11th day of the same month. Afterwards the land was sold at tax sale for the unpaid taxes assessed against it and the unpaid taxes assessed against Pound on his personal property, for the years 1893, 1894 and 1895. After the sale, Almira S. Burr, for the purpose of a redemption of the land from the tax sale, tendered to the treasurer the amount of the taxes, interest, costs and penalties, due on account of the assessment against the land; but the treasurer refused to receive the money or allow a redemption unless the taxes, interest, costs and penalties due on

account of the assessment against Pound on his personal property were also paid.

This action was brought in the name of the people of the state on the relation of Almira S. Burr to compel the treasurer to receive the amount so tendered, and issue a certificate of redemption to the relator. The cause was heard on the petition and answer, and a peremptory writ of mandamus ordered as prayed in the petition. The respondent appeals.

In support of the judgment, the relator relies on the decision of this court in the case of *Gifford v. Callaway*, 8 Colo. App. 359. This decision will be noticed later.

For the respondent it is contended, first, that by the express terms of the statute there can be no redemption at all except upon payment, not only of the taxes assessed against the land, but of the taxes levied on the personal property of the owner; so that the claim of the purchaser as well for the money paid on account of the personal tax as for the money paid on account of the tax against the land, is paramount to all other claims; and, second, that even if the relator might be entitled to relief, her remedy is not mandamus.

In support of the first proposition we are referred to the following sections of Mills' Annotated Statutes:

“3882. The county treasurer shall, before the twentieth day of April in each year, make out a list of all lands and town lots subject to sale, describing such lands and town lots as the same are described on the tax roll, with an accompanying notice stating that so much of each tract of land or town lot described in said list as may be necessary for that purpose will, on a day specified thereafter, and the next succeeding days, be sold by him at public auction at the county treasurer's office, for the taxes and charges

thereon, and taxes and charges assessed against the owner thereof for personal property.”

“3905. Real property, sold under the provisions of this act, may be redeemed by the owner, his agent, assignee or attorney, at any time before the expiration of three years from the date of sale, and at any time before the execution of the deed to the purchaser, his heirs or assigns, by the payment to the treasurer of the proper county, to be held by him subject to the order of the purchaser, of the amount for which the same was sold, with interest thereon at the rate of twenty-five per cent. per annum from the date of sale, and fifteen per cent. on the sum if redeemed within three months from the date of the sale thereof, and twenty-five per cent. if redeemed after three months and within one year from the date of sale, and forty per cent. if redeemed after one year and within two years from the date of sale, and fifty per cent. if redeemed after two (2) years and within three (3) years, together with the amount of all taxes accruing on such real estate after the first sale, paid by the purchaser and indorsed on his certificate of purchase, with interest on the same at the rate of twenty-five per cent. per annum on such taxes paid subsequent to such sale.”

By the terms of section 3882 real estate must be sold at tax sale as well for the taxes on the owner's personal property as for the taxes assessed against the land; and the redemption provided for by section 3905 is accomplished by payment of the entire amount for which the land was sold; but it is only where the redemption is effected by payment to the treasurer that the provisions of the latter section are applicable; and if there could be no redemption from a tax sale except by payment to the treasurer, the position of the holder of a prior mortgage would be no better than that of the owner of the land. The

latter owes the debt and there is, therefore, no hardship in requiring full payment from him as a condition of redemption; but to make the tax upon his personal property a claim against the land paramount to the lien of a prior mortgage, might seriously impair the value of the security. He might, after the execution of the mortgage, acquire personal property to such amount and of such value that the tax would render the security worthless. It would be impossible for a creditor, when taking his mortgage, to anticipate future dealings of his debtor; and if the status of his security were dependent on them, conditions might be brought into existence which would render him a helpless spectator of the confiscation of his own property. It is within the power of the legislature to give precedence to a tax on personal property over antecedent incumbrances; but, in view of possible results, the intention so to do must appear in express and unmistakable language.—See *State v. Newark*, 42 N. J. L. 38.

In *Gifford v. Callaway*, *supra*, it was held by this court that if the statute created a lien upon land for the taxes on the owner's personal property, that lien was subject and subordinate to valid prior liens. A lien is, in terms, created upon real estate for the taxes assessed against it; and the assessment and all subsequent proceedings down to and including the sale, are against the land without regard to title.—Mills' Ann. Stats., secs. 3770, 3812, 3890. It is, therefore, evident that the intention was that the lien of those taxes should attach to the land without regard to title and should, consequently, be superior to all other liens.—See *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Spratt v. Price*, 18 Fla. 289.

But in the case of personal property the assessment and the subsequent proceedings are against its owner. Any personal property of his is subject

to seizure and sale for the tax, whether it be the same property upon which the tax was levied or not; and if the property taxed has been removed from the county or cannot be found by the treasurer, the amount may be collected by suit against him. —Mills' Ann. Stats., sec. 3771.

The proceedings throughout are *in personam*, and the provision for the sale of the owner's land for the same tax furnishes a remedy which is cumulative merely. The proceedings being against the person and not against the land, the sale of the land for the claim against the person can affect only the interest of the person. The certificate of purchase invests the purchaser with the lien of the tax against the land, which is paramount to all other liens, and also with a lien for the money paid by him on account of the personal tax which is subject to prior liens. Our conclusion is that while the relator's trust deed is subject to the lien of the purchaser on account of the tax assessed against the real estate, it is not subject to the lien which he has acquired on account of the tax levied on the owner's personal property; and that, in a proper proceeding, she would be entitled to a release, as to her interest, upon payment only of the amount primarily chargeable against the land.

The second of the respondent's propositions is, we think, correct. In the case of *Gifford v. Callaway*, upon which the relator relies, there had been no sale for taxes. The plaintiff, who had become the owner of the real estate through foreclosure of a trust deed at a time when taxes were being regularly collected, tendered to the treasurer the amount of the tax assessed against the land; but that officer refused to receive the money unless the tax upon the personal property of the grantor in the trust deed, levied before the foreclosure but long after the execution of

the deed, was also paid. We held that it was the duty of the treasurer to receive the money tendered and that mandamus would lie to compel him so to do. But in essential particulars there is a distinction between that case and this which renders the rule announced there inapplicable here. While the treasurer is still engaged in the collection of taxes he is acting in behalf of the state and county; and when the full amount due in any particular instance is tendered he is bound to receive it. As against an incumbrancer there is a lien for the taxes assessed upon the land, and that lien the incumbrancer has the right to discharge for the protection of his security. Those being the only taxes with which his interest is charged, the treasurer has no discretion to refuse him permission to pay them. But the situation is altered by a sale of the land for taxes. The state and county have then received the money due them respectively, and their claim has been transferred to the purchaser. It is with him that future dealings must be had. The law provides that the redemption money may be paid to the treasurer; but that officer holds it subject to the order of the purchaser. He receives it, not as the agent of the state or county, but as the agent of the purchaser. As he is constituted such agent by statute and not by contract, his authority is limited by the terms of the statute. In the matter of receiving the redemption money the sole authority which he possesses is found in section 3905. That section permits redemption upon payment to him of the sum for which the land was sold with a specified interest and a specified penalty. Nowhere is he allowed to abate a dollar of the amount. The money belongs to the purchaser; and while the immediate parties may adjust the matter to their liking, the treasurer must act within the letter of the law.

Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.—Mills' Ann. Code, sec. 307.

It is not the duty of the treasurer to receive in redemption less than the amount for which the land was sold, with the interest and penalty. To make the statement a little more explicit, it is his duty not to receive in redemption less than the amount for which the land was sold with the interest and penalty. This proceeding, the purpose of which is to compel the respondent to do something which it is not his duty to do or, otherwise stated, which it is his duty not to do, must fail.

But, notwithstanding the treasurer cannot be forced to receive in redemption less than the amount named in the statute, an incumbrancer desiring to be relieved from the lien by which he is affected is not without a remedy. The purchaser holds a certificate of purchase which he cannot be compelled to surrender or the validity of which cannot be impaired except upon payment to him of his entire purchase money with the statutory interest and charges; but in a proceeding in equity against him to which the treasurer would not be a proper party, redemption, so far as may be necessary for the protection of the mortgagee's security, might be decreed. The certificate of purchase would not be surrendered; it would still entitle the holder to a deed for the land, but the instrument would convey only the title of the defaulting owner. It would be subject to the incumbrance; but the grantee would, in virtue of the title received by him, have the right to pay off the debt, and thus perfect his title.

The judgment is reversed, with direction to dismiss the proceeding.

Reversed.

[No. 2185.]

CAMPBELL AS TRUSTEE V. THOMPSON ET AL.

Bankruptcy—Corporations—Property Subject to Debts of Bankrupt—Husband and Wife.

Where a bankrupt merchant became manager of a mercantile company and by his knowledge and skill in the management and control of the business of the corporation greatly enhanced the value of the capital stock of the corporation, the creditors of such bankrupt are not entitled to the enhanced values imparted to said stock by his services. Nor does the fact that the wife of said bankrupt was the principal owner of the stock of the corporation alter the situation.

Appeal from the District Court of Arapahoe County.

Messrs. ROGERS, CUTHBERT & ELLIS, for appellant.

Messrs. ROBINSON & ANFENGER, for appellees.

THOMSON, J.

In this proceeding Milton N. Campbell, as trustee in bankruptcy of the estate of John Thompson, a bankrupt, sought a decree vesting in him as such trustee certain shares of the capital stock of The John Thompson Grocery Company, a corporation, held by Flora Thompson and Philip Gomer. The complaint alleged the recovery of judgments against John Thompson for the satisfaction of which sufficient property was not found; the filing by him of a voluntary petition in bankruptcy; the entry of the proper order, adjudging him a bankrupt; the appointment of the plaintiff as trustee; the subsequent incorporation of The John Thompson Grocery Company with a capitalization of five thousand dollars, divided into five hundred shares, of the par value of ten dollars each; the naming of John Thompson and the defendants, Flora Thompson and Philip Gomer, as directors of the corporation, and the issuance to the defendant, Flora Thompson, the wife of John

Thompson, of the entire capital stock except two shares, one of which was issued to the defendant Philip Gomer, and the other to John Thompson. The complaint further alleged that all of the capital of the corporation was furnished by John Thompson; that the defendants had no interest in it whatever, and that the purpose of the issue of stock of which John Thompson was the real owner to the defendants was to put it beyond the reach of his creditors.

The allegations that the capital was furnished by John Thompson, that the defendants had no interest in it and that their stock was issued to them to put it beyond the reach of the creditors of John Thompson were denied by the answer.

The proof was that no part of the capital was furnished by John Thompson; and that all the money which went into the business of the company was the separate property of the defendant, Flora Thompson, except, possibly, the price of the one share held by the defendant Gomer, and that was not furnished by John Thompson. The share held by the latter was given to him by Flora Thompson to qualify him to act as director. The judgment was for the defendants, and the plaintiff appealed.

The case presented in the complaint was not sustained at the trial. In fact, it was disproved by the witnesses on both sides; and we are unable to find any evidence upon which a judgment different from the one rendered could have been based. However, counsel for the plaintiff, conceding that it was not shown that the capital was furnished by John Thompson, have furnished us with a carefully prepared argument based on the following allegation of the complaint, which they say was proved:

“That the said bankrupt, John Thompson, has by his efforts, knowledge, skill, management and control of said business, so operated the business of said

corporation that the said shares of stock have become valuable, and are now worth the sum of ten thousand dollars (\$10,000).''

Now, in the first place, counsel are mistaken in supposing that this allegation was proved; and, in the second, it is a matter of no consequence whether it was or not. It appeared that the company prospered, and that as a consequence there was a very considerable increase in the value of the stock. That this result was due, in part at least, to the management of John Thompson is a safe conclusion from the evidence. It also appeared that Flora Thompson and Philip Gomer bore an important part in the conduct of the business, and that others were entitled to a portion of the credit for the company's prosperity. Mr. Gomer, as a witness, found one of the reasons for the success of the enterprise in the "loyalty, intelligence and honest service of about forty employees of high and low degree," and another in the favorable location of the concern. While Mr. Thompson, without doubt, contributed to the general result, what proportion of the increase may be credited to him and what to other persons and causes there is no means of knowing, so that even if his creditors were entitled to the benefit of values imparted by his services the evidence furnishes no data for a judgment.

But there is no way by which the services or abilities of a debtor can be reached by a creditor. When they are converted into tangible property of his own that property may be subjected to the payment of claims against him. When they are exerted in behalf of another his creditors may, by some process, compel the application of his wages, not exempt from execution, upon his debts; but the benefit which accrues to that other from his services is not his. It belongs to the person for whom the services were rendered. The very purpose of employing

skill is to enhance value. If, by means of services which John Thompson rendered to the grocery company, the defendants were the gainers, the results of the investment which they made and of the wisdom displayed in its management belong solely to them.

Nor does the fact that Flora Thompson was the wife of John Thompson alter the situation in the least. In this state a married woman may own property and engage in business unfettered by any of the restraints or disabilities of coverture; and neither her property nor the proceeds of her enterprise can be subjected to the payment of any debts but her own.—*Wells v. Caywood*, 3 Colo. 487; *Stramann v. Scheeren*, 7 Colo. App. 1.

The judgment below was correct and must be affirmed.

Affirmed.

[No. 2179.]

COLBURN V. DORTIC ET AL.

Quieting Title—Pleading—Judgment on Pleading.

In an action to quiet title to an undivided three-fourths interest in a mining claim where the complaint disclosed the estate claimed by plaintiffs and the title by which the same was held, and one of the defendants answered alleging title to an undivided one-tenth interest in the claim and from the answer it appeared that defendant deraigned title from the same source that plaintiffs deraigned title to part of their claim, and from the pleadings it appeared that the interests claimed by plaintiffs and defendant from a common source was in excess of the interest owned by their common grantor, the claim of defendant was to the extent of such excess adverse to plaintiffs' interest and it was error to strike out defendant's answer and enter judgment for plaintiffs on the pleading.

Appeal from the District Court of Lake County.

Messrs. PHELPS & PENDERY and Mr. A. S. BLAKE,
for appellant.

Messrs. BALDWIN & BOSTON and Mr. GEORGE R. KIDDER, for appellees.

GUNTER, J.

Plaintiffs brought an action to quiet title to an undivided three-fourths interest in the Katheleen lode claim, asking in the complaint "that the defendants may be required to set forth the nature of their claim and that all adverse claims of the defendants may be determined by a decree of this court. * * * and that the defendants be forever enjoined and debarred from asserting any claim whatever in or to said Katheleen lode mining claim and premises adverse to plaintiffs herein * * *."

Defendant, Lizzie A. Colburn, answered alleging herself to be the owner of an undivided one-tenth interest in said claim.

The complaint discloses the estate claimed by plaintiffs, also the title by which same is held.

The answer makes disclosure as to the estate and title of defendant, Lizzie A. Colburn.

From such pleadings it appears that plaintiffs deraigned title to one-fourth of the three-fourths interest claimed by them in the lode through one Laughlin McMullin; also that McMullin originally owned not exceeding an undivided one-fifth interest therein. It appears from above answer that defendant claims an undivided one-tenth interest in the lode, and that the same is carved out of the original interest of said McMullin. As plaintiffs claim one-fourth of their interest or an undivided three-sixteenths interest in the lode, through McMullin; as defendant claims her undivided one-tenth interest therein through the original interest of McMullin; as McMullin has never had exceeding one-fifth interest in the lode, he has never owned a sufficient interest therein to satisfy the claims of plaintiffs and defendant. The claim of de-

fendant, therefore, is to some extent adverse to the interest of plaintiffs.

Upon the motion of plaintiffs the court struck out the answer of Mrs. Colburn setting up this adverse interest and thereupon gave judgment quieting the title in plaintiffs to an undivided three-fourths interest in the lode. To review alleged error in this ruling defendant as appellant is here. The correctness of the ruling of the lower court must be determined by the complaint and by this stricken answer because no other pleadings were then before it. The plea in abatement setting up the pendency of another suit had been withdrawn by the defendant by leave of court, and the ruling of the court below should have been based as to the motion to strike the answer of Mrs. Colburn, as is the ruling of this court, solely upon the complaint and the answer of Mrs. Colburn. Looking to these pleadings we find a complaint in an action to quiet title. Under the law of this state it was obligatory upon the defendant in order to set up a defense to the cause of action stated in the complaint, to allege in her answer the adverse interest she claimed in the premises in dispute. *Wall v. Magnes*, 17 Colo. 476. She did set out such interest in her answer, and it should have stood against the motion to strike.

The case should be reversed with instructions to the lower court to deny the motion of plaintiffs to strike the answer of Mrs. Colburn and the motion of plaintiffs for judgment upon the pleadings.

Judgment reversed.

Reversed

Thomson, J., not sitting.

[No. 2141.]

SULLIVAN ET AL. V. THE GERMAN NATIONAL BANK
OF DENVER ET AL.

18	99
18	180

1. **Negotiable Instruments—Bank Certificates of Deposit.**

Bank certificates of deposit are negotiable instruments.

2. **Negotiable Instruments—Indorsement—Contracts.**

An indorsement of a negotiable instrument is not only a transfer of the instrument but is an original, independent contract by which the indorser is regarded as promising to pay at the place where the indorsement is made in the event of dishonor and due notice.

3. **Same—Lex Loci.**

The liabilities and obligations of an indorser of a negotiable instrument are determined by the law of the place where the indorsement is made even though the instrument indorsed is expressly made payable elsewhere.

4. **Law of Other State—Presumption.**

Where the law of another state becomes material and there has been no evidence offered concerning it, our courts will presume that the general principles of the common law prevail there the same as in this state, but it will not be presumed that such other state has adopted the same or similar statutes as have been adopted in this state.

5. **Negotiable Instruments—Bank Certificates of Deposit—Indorsement—Gaming Contracts—Lex Loci.**

Where a certificate of deposit in a Colorado bank was indorsed in another state by the payee in payment of a gaming debt which was again indorsed and passed into the hands of an innocent purchaser, the original indorser cannot avoid liability on his indorsement under section 1344, Mills' Ann. Stats., making all gaming contracts void, and in the absence of a showing of a statute of the state where the indorsement was made which would invalidate his indorsement, he will be held liable thereon.

Appeal from the District Court of Arapahoe County.

Mr. HIRAM D. INGERSOLL and Messrs. FELKER & DAYTON, for appellants.

Mr. A. B. SEAMAN and Mr. H. S. SILVERSTEIN, for appellees, The German National Bank of Denver, and William A. Platt, receiver of The German National Bank of Denver.

Mr. OSCAR REUTER, for appellee, Joshua H. Wilbraham.

WILSON, P. J.

About September 5, 1893, defendant Wilbraham received from The German National Bank of Denver, one of defendants, two time certificates of deposit, each for the sum of \$1,000.00, bearing six per cent. interest and payable, the one numbered 102755, on March 5, 1894, and the other, numbered 102756, on September 5, 1894. They were in the usual form, each specifying that Wilbraham had deposited in the bank \$1,000.00, payable to the order of himself, in current funds, on the return of the certificate properly endorsed by him at the time specified for payment. About March 10 following Wilbraham, at the city of San Antonio in Texas, endorsed and delivered both of said certificates to one W. S. Allen who on the same day deposited them for collection for his account with plaintiffs, D. Sullivan & Company, bankers in said city of San Antonio. Upon transmission to Denver the certificate No. 102755 which was then past due was promptly paid upon presentation to the payor, The German National Bank, but payment of the other certificate was refused because it had not then matured. Upon receipt of payment Sullivan & Company paid to Allen the amount received on collection of the certificate which had been paid and returned to him the other, payment of which had been refused. Shortly thereafter, and before its maturity, Sullivan & Company purchased from Allen the remaining certificate, payment of which had been refused. When this certificate matured, the payor, The German National Bank, had become insolvent, and its business was then in the hands of a receiver. Thereupon, on June 10, 1895, the company instituted this suit to re-

cover on the certificate which it had purchased, making the German National bank, the payor, a defendant, and also Wilbraham and Allen, the endorsers. Defendant Wilbraham answered, setting up as a defense that the endorsement and assignment by him of the certificate sued upon were void because of the gaming statutes of Colorado.—Gen. Stats., sec. 850; Mills' Ann. Stats., sec. 1344. It was specifically alleged in this answer "that on or about March 10, 1894, the defendant was compelled by duress, intimidation and superior force, and as a part of one and the same transaction, to sign his name upon the back of each of said two certificates, and that thereupon the said certificates were wrongfully taken from the defendant, as part of one and the same transaction by the said unknown persons by duress, intimidation and superior force. That at the time said certificates were so signed and wrongfully taken from the defendant, the defendant was by duress, intimidation and superior force compelled to take part in some gambling transaction, the particular name of which is unknown to the defendant, but which this defendant now believes is usually called 'three card monte', and that said certificates were so signed and taken from the defendant solely in consideration of money won by gambling, or playing at cards, or some gambling device or game of chance. * * * That the defendant received no consideration whatever for said certificates, or either of them, or for writing his name upon the back of the same, and that the said endorsement and delivery of said certificates were absolutely and wholly without consideration."

Defendant also, by way of counterclaim and cross-complaint, set up the facts with reference to the endorsement, and prayed judgment against the German National bank and Sullivan & Co. for the sum of \$1,000.00 represented by the first certificate, which

had been paid as we have stated, and which he claimed had been unlawfully and wrongfully paid. He also prayed judgment that as to the certificate upon which this suit was brought by plaintiffs, it be decreed that the transfer and endorsement were void, and that Sullivan & Co. transfer all of their alleged right, title and interest in it and deliver the same to the said defendant. Judgment was in favor of defendant Wilbraham to the full extent prayed for by him.

It is unnecessary to set forth in detail the circumstances attending the endorsement and transfer of the certificates by Wilbraham, and the so-called gambling transaction in which they were involved, all of which were fully testified to by this defendant. It is conceded that at the time of the payment by the German National bank of the certificate No. 102755, it had no notice whatever of any infirmity or vice affecting the endorsement by Wilbraham, and that Sullivan & Co. had no such notice at the time it purchased in the usual course of trade, the certificate upon which this suit is based. Indeed, it does not appear that either of the banks ever had any such notice until it was given by the filing of defendant Wilbraham's answer in this suit, in November, 1898.

That a bank certificate of deposit is a negotiable instrument cannot be questioned.—2 Daniel on Negotiable Instruments, 4th ed., § 1703; *Zang v. Wyant*, 25 Colo. 551. It is also settled by undisputed authority that an endorsement of a negotiable instrument is not only a transfer of the instrument, but that it is an original, independent contract, equivalent to the drawing of a new bill on the maker and drawer, or acceptor, as the case may be, of the instrument that is endorsed. By this independent contract the endorser is regarded as undertaking to pay at the place where his endorsement is made in the event of dishonor and

due notice, and in the making of it is not considered as merely adopting the date, place and time of the bill or note which he endorses.—Tiedeman on Commercial Paper, § 256; 1 Daniel on Negotiable Instruments, 4th ed., § 899. This doctrine has now become elementary in commercial law, and the authorities in support of it are almost without exception. This being true, it necessarily follows, and is equally well settled by the almost universal current of authority, that in determining the liabilities and obligations growing out of this contract of endorsement, the endorser is bound by the law of the place where he made the endorsement, even though the instrument, bill or note which he endorsed was expressly payable elsewhere.—1 Daniel, Negotiable Instruments, *supra*; *Brook, Oliphant & Co. v. Vannest*, 58 N. J. Law, 163; *Musson v. Lake*, 45 U. S. 967.

Assuming, therefore, but not conceding, that the facts in this case are sufficient to bring Wilbraham's contract of endorsement within the inhibition of the Colorado gaming statute, it is nevertheless true that in determining the effect and validity of the endorsement, the law of Texas must control. It has been frequently held in this jurisdiction that the statutes of this state have no extra-territorial force or effect—that they have no application to transactions occurring beyond the limits of the state.—*Railroad Co. v. Betts*, 10 Colo. 437; *Wolf v. Burke*, 18 Colo. 264; *Wells v. Bank*, 23 Colo. 534. No statute of Texas was shown similar to that of Colorado, or which would invalidate the endorsement of a negotiable instrument under the circumstances of this case, or prevent a recovery against the endorser. Under such circumstances, it is held that "where the condition of the law of another state becomes material, and no evidence has been offered concerning it, our courts will presume that the gen-

eral principles of the common law which we always consider to be consonant with reason and natural justice prevailed there, but no such presumption obtains respecting the statute law of a state. There is generally no probability, in point of fact, and there is never any presumption of law, that other states or countries have established, precisely or substantially, the same arbitrary rules which the domestic legislature has seen fit to enact."—*Railroad Co. v. Betts, supra; Wolf v. Burke, supra*. It is to be presumed, however, that the general principles of the common law as adopted in this state, prevail there, and hence it must be conceded that under the law of Texas the endorsement of the certificates in question was not affected nor invalidated by any of the facts alleged. It is a familiar principle of the common law that the purchaser or holder of a negotiable instrument, who has taken it *bona fide*, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between the antecedent parties. No citation of authorities is needed to this proposition.

In addition to the indulgence of this legal presumption, the courts of a state in cases where the laws of another state are involved, may and should take notice of the decisions of the highest courts in the latter jurisdiction upon the law so involved. In 1890 it was held by the supreme court of Texas that under the law of that state a promissory note, the sole consideration for which was a gambling debt, was not void, but was good and enforceable in the hands of an innocent endorsee for value before maturity—that such a note, as well as all contracts hav-

ing a similar consideration, were voidable only as between the parties and also between the maker and endorsee after maturity, or with notice.—*Thompson v. Samuels*, 14 S. W. 143.

The Colorado gaming statute is exceedingly similar to that of statute 9 Anne, chapter 14, page 1, as cited by appellee, but the common law of England and acts of parliament in aid thereof, obtain as a rule of decision in this state only as they existed prior to the fourth year of James the First, which was long prior to the reign of Anne.—Gen. Stats., sec. 197; Mills' Ann. Stats., sec. 4184.

It is urged, however, by counsel that the rule permitting and requiring the law of the place of contract to control in its interpretation and enforcement, is based alone upon comity between states, and that it is not without exception. He insists that no state should or is bound to follow the rule when the law of the foreign state in question would contravene its own positive laws, institutions or policy, which prohibit such a contract, or when it would prejudice the rights of its citizens. This exception is undoubtedly true, and should be considered and followed in a proper case, but we do not think this such a case. The principle which lies at the basis of this exception and upon which it is founded, is that the state should not be compelled to adopt the law of a foreign state, when by so doing it would exhibit to the citizens of the state an "example pernicious and detestable," and detrimental to good morals.—*Greenwood v. Curtis*, 6 Mass. 358. In short, the general rule as expressed by the more modern authorities is that the law of the foreign state should control and should be enforced unless it is clearly against good morals, or repugnant to the positive institutions of the state in which enforcement is sought. We are by no means prepared to say that this case, turning as it does upon the endorsement of

negotiable paper whereby the rights of innocent purchasers were affected, is such a case. On the contrary, we think under the facts here presented, it would be highly inequitable to follow this exception to the rule. Under the common law as adopted in this state, the contract sought to be enforced was affected with no vice. It was in all respects valid and enforceable.

Especially are we confirmed in these views when it has been held by our own courts that our gaming statute is a harsh one, in derogation of the common law, and should be strictly construed; that its provisions making void a certain class of negotiable paper, should not be extended.—*Boughner v. Meyer*, 5 Colo. 71; *Bank v. McClelland*, 9 Colo. 611.

It is the rule in this state in reference to negotiable instruments, the sole consideration of which are confessedly gambling debts and come within the inhibition of the gaming statutes, that in actions thereon by an innocent holder for value before maturity, the courts will submit to the statutory command with extreme reluctance.—*Bank v. McClelland*, *supra*. If this were a case between the original parties to a contract whose consideration came within the prohibition of the statute, or wherein an assignee with notice was seeking to enforce it, our conclusions might be entirely different. Then it might well be claimed that a case was presented coming clearly within the exception to the rule that in suits upon contracts the *lex loci* must control.

It is recognized everywhere as a settled principle of commercial law except where modified by statute, that the holder or purchaser of a negotiable instrument who has taken it *bona fide* for a valuable consideration in the ordinary course of business before maturity and without notice of facts which impeach its validity as between antecedent parties, may recover

on it although it was originally executed without any consideration at all, or has been subsequently released or paid, and even though it was originally obtained by fraud, theft or robbery.—1 Daniel, Neg. Inst., § 769a. If this well-settled and universally approved doctrine be not offensive or shocking to the moral sense of the community, we cannot see how it should become so under the circumstances of this case to hold that the law of Texas should control, and that plaintiffs be permitted to recover, they being confessedly innocent purchasers for value, the original instrument itself being untainted with invalidity, and the endorsement being genuine. Whatever doubts may be raised as to the legal liability of defendant Wilbraham, there can be no question as to his moral responsibility because of his utter failure to give any notice of his misfortune or to exercise any of even the most ordinary precautions to prevent loss to the innocent by reason thereof. His reluctance to do this because of personal shame and mortification may palliate his wrong, but does not excuse it in law.

There are several other entirely satisfactory reasons in our opinion why the judgment in this case was radically wrong and should be reversed, but the one which we have stated at length being decisive of the entire case, it is not necessary to mention or discuss them. The judgment will be reversed.

Reversed.

[No. 2142.]

THE GERMAN NATIONAL BANK OF DENVER ET AL. V.
WILBRAHAM ET AL.

Opinion Followed.

This cause is reversed on the opinion in the case of Sullivan et al. v. The German Nat. Bank et al., ante, p. 99.

Error to the District Court of Arapahoe County.

Mr. A. B. SEAMAN and Mr. H. S. SILVERSTEIN, for plaintiffs in error.

Mr. OSCAR REUTER, for defendant in error, Wilbraham.

Mr. H. D. INGERSOLL and Mr. W. L. DAYTON, for defendants in error, D. Sullivan & Company.

WILSON, P. J.

The proceedings and judgment of the district court brought up for review by this case, No. 2142 on our docket, are identical with those brought up on appeal in No. 2141, entitled *D. Sullivan and Company v. The German National Bank of Denver, Joshua H. Wilbraham and others*, and which we have just decided. There was but one suit in the district court, and in the two appellate proceedings here pending the pleadings, record and evidence are the same. D. Sullivan & Company, who were plaintiffs in the trial court and against whom judgment was rendered, brought the case here on appeal. The German National Bank of Denver, which was one of the defendants in the district court and against whom judgment was also rendered in favor of its codefendant Wilbraham, brought the case here on error.

Our determination of the appeal is decisive of ~~this~~ case. For the reasons there given in our opinion, the judgment herein will be reversed.

Reversed.

[No. 2158.]

THE PENNSYLVANIA MINING COMPANY OF
COLORADO v. BALES.

1. Mining Claims—Filing Adverse—Pleading—Presumption.

In an adverse suit where the complaint alleged the filing of the adverse in the United State land office it will be presumed that it was filed within the time prescribed by the United States statutes for such filing.

18	108
19	153
18	108
134s	346

2. Same—Waiver.

In an adverse suit if the defendant desires to raise the question that the adverse was not filed in the United States land office within sixty days after publication or that the adverse suit was not filed within thirty days from the filing of the adverse in the land office, he must raise such question either by demurrer or answer, and if he goes to trial without having done so he waives the objections.

3. Adverse Suits—Time of Filing—Pleading.

Where the file marks on a complaint in an adverse suit show that it was filed within thirty days from the filing of adverse in the land office it was not necessary to allege in the complaint that it was filed within said time.

Error to the District Court of Clear Creek County.

Mr. W. J. THOMAS and Mr. C. H. PIERCE, for plaintiff in error.

Mr. J. J. WHITE and Messrs. MORRISON & DE SOTO, for defendant in error.

GUNTER, J.

This was an adverse suit. Plaintiff had verdict and judgment.

Defendant—plaintiff in error—contends that the complaint did not state a cause of action in this: It omitted to allege the filing of the adverse in the land office within the sixty days of publication, and failed to allege that this action was instituted within thirty days from the filing of the adverse. These objections were made first at the trial in resistance to the introduction of the evidence.

1. The complaint alleged the filing of the adverse in the land office. The federal statute prescribes that the adverse shall be filed within the sixty days of publication. The allegation that the land office had received and filed the adverse carried with it a presumption that it had been filed within the legal time—the sixty days. If defendant desired to raise the question of a failure to file within the sixty days he should

have done so by pleading it specially in a demurrer or answer; having gone to trial without having done so, it was waived.—*Richmond Mining Co. v. Rose*, 104 U. S. 576, 583; *Marshall Silver Mining Co. v. Kirtley*, 12 Colo. 417, 21 Pac. 492; *Providence Gold Mining Co. v. Marks*, 60 Pac. (Ariz.) 939.

2. The above authorities sustain the conclusion that defendant in the same manner waived the objection—if one—that the complaint herein did not allege the filing thereof within thirty days from the filing of the adverse in the land office.

Further, it sufficiently appears from the complaint herein that the adverse claim was filed September 17, and the file mark in the record proper discloses that the complaint herein was filed October 3, within the thirty days required. As the court below took judicial notice of the file mark it was not necessary to allege its date in the complaint. The file mark is before this court in the record proper.—*Su'em v. Green*, 9 Colo. 358, 12 Pac. 202.

The fact of the filing of the complaint within the thirty days was thus before the court without an allegation to such effect therein.

Judgment affirmed.

Affirmed.

[No. 2183.]

APPELMAN V. THE BROADWAY INSURANCE COMPANY.

1. Pleading—Practice—Insufficient Denial—Waiver.

Where the denial in an answer was, in form, "denies each and every other material allegation," an objection to its sufficiency after plaintiff has introduced his evidence in support of the allegations intended to be put in issue by the denial and when defendant offered to introduce his evidence, came too late, and the insufficiency was waived.

2. Contracts—Principal and Agent—Insurance.

In an action by an insurance company against its local agent to recover premiums collected to its use, a counterclaim by defendant alleging a contract whereby plaintiff agreed in

case it withdrew from the insurance business in defendant's territory nothing should be done to disturb the business on defendant's books, but that defendant should have the option to reinsure all of its business in other companies or to take up all policies then in force at pro rata premiums less the cost of obtaining the same, and a breach of said contract whereby plaintiff without defendant's knowledge or consent retired from business in defendant's territory and caused its business to be reinsured by another insurance company without notice to defendant and without giving him an opportunity to exercise his option as provided in the contract, states a cause of action against the insurance company.

Appeal from the District Court of Arapahoe County.

Mr. SYLVESTER G. WILLIAMS and Mr. HARVEY RIDDELL, for appellant.

Mr. HENRY CHARLES CHARPIOT, for appellee.

Messrs. BROWNELL AND PATTERSON, of New York City, of counsel.

GUNTER, J.

1. Plaintiff's cause of action was stated in two counts—one on an account for fire insurance premiums received by defendant to the use of plaintiff; the other on an account stated, covering the same premiums. The first ground of defense was a denial; the second a counterclaim. The form of the denial was: "Denies each and every other material allegation of the said second alleged cause of action."

The evidence of plaintiff tended to show that defendant was its local agent; that as such he wrote policies, collected premiums thereon and was indebted in a balance upon an account for such collections.

Defendant offered to show in effect that at all times mentioned in the complaint a certain corporation, and not defendant, was the agent of plaintiff; that defendant was merely a stockholder in and an officer of said corporation, and that plaintiff's claim was against such corporation and not against defend-

ant. This offer was refused. It is contended that this ruling was correct because the allegations of the second count were not put in issue by above denial. The time when objection was made in the trial court to the sufficiency of the above denial is material. After plaintiff had closed its evidence in chief, and when defendant began to offer his evidence, this objection was made. The objection came in the form that the tendered testimony was "irrelevant." We think it came too late. By leaving this ground of defense in question until trial and by offering evidence in support of its complaint, plaintiff treated the denial as sufficient. If the denial was not sufficient there was no need of tendering any evidence whatever in support of plaintiff's claim.—*Collins v. Trotter*, 81 Mo. 275; *First National Bank v. Hastings*, 7 Colo. App. 129, 131, 42 Pac. 691.

2. The counterclaim was:

"That plaintiff entered into a written contract with defendant, whereby * * * the plaintiff did agree that in the event of said plaintiff's retiring from the agency business at Denver by reinsurance or otherwise, nothing should be done to disturb the business on the books of the defendant, but * * * that it should be optional with said defendant upon notification of said plaintiff's intention to stop doing business at Denver, to make in a reasonable time, not exceeding thirty days, either a reinsurance contract of all business of defendant in said plaintiff company * * * on terms satisfactory to said plaintiff, * * * or to be privileged to take up all policies then in force in said company at *pro rata* premiums less cost of obtaining the same, as had been charged by defendant to said plaintiff in former accounts.

"And defendant says that * * * the plaintiff on * * * the 11th day of November, A. D. 1896, without the knowledge or consent of the defend-

ant and without any notice to defendant, did proceed to retire from the agency business at Denver, and did itself cause to be reinsured in another fire insurance company, * * * without the knowledge, consent of or notice to defendant, all of the business on the books of defendant and neglected and refused to allow the defendant to exercise his option as provided in said agreement or to either make a reinsurance contract of said business or to take up the policies in force, as was in said agreement provided that defendant might do. But there and then plaintiff did terminate forthwith the agency of defendant, and sold all records and supplies in possession of defendant to the said * * * agency, and did notify defendant that henceforth no policy of said Broadway Insurance Company should be cancelled for any cause, except at short rates * * *. And further, thereafter, although the defendant did elect and did duly notify the plaintiff of his election to cancel said policies at *pro rata* premiums, the plaintiff refused and at all times since has refused to permit the cancellation of said or of any of said policies or to permit the business to be reinsured by defendant; and did repudiate its agreement in that behalf and refused to be bound thereby.

“That the defendant has duly performed all conditions of said contract on his part to be performed.

“By reason of the said acts and breach of said contract by the plaintiff the defendant was and is greatly injured and damaged * * * in his business, and sustained by reason of said acts of the plaintiff great financial loss and damage and inconvenience and loss of time, to the damage of the defendant in the sum of \$2,000.”

Among other defenses to this counterclaim was a denial. Defendant introduced without objection the contract sued on in the counterclaim. Also evidence

tending to show a breach of the contract by plaintiff; then offered to show that he was damaged in his business by reason of the breach of the contract of the plaintiff in refusing to permit him to reinsure the business or cancel the business *pro rata*. He further offered to show that by the contract of reinsurance entered into by the plaintiff with The Hartford Fire Insurance Company the business upon his books evidenced by the expiration list was turned over to The Hartford Fire Insurance Company and all his expirations thereby disclosed; that these expirations and the secrecy of the same which belonged to his business were valuable; that under the terms of this contract had he been permitted to reinsure or cancel, his business would have been protected and his expiration list kept secret, whereas, by its being disclosed, its value was destroyed. The court refused the offer.

From the briefs of counsel it seems that the ruling of the court in rejecting the evidence was because the counterclaim did not state facts sufficient to constitute a cause of action. We fail to see wherein the counterclaim is so defective. It appears plaintiff agreed with the defendant that if it retired from the agency business at Denver nothing should be done to disturb the business on the books; that he should have the option of reinsuring the business in plaintiff's company upon his books or of cancelling the policies at *pro rata* rates. This was a valuable right to defendant, as it would be to any agent with business on his books. This right, according to the allegations of the counterclaim, was violated. From the violation of the right nominal damages at least ensued. While we express no opinion as to what is a measure of damages in such case, we think the lower court erred in refusing to permit defendant to introduce evidence to sustain his allegation of damage.

Judgment reversed.

Reversed.

[No. 2178.]

ARNETT V. HUGGINS.

1. Mortgages—Wrongful Sale by Mortgagee—Measure of Damage—Conflicting Instructions.

In an action for damage for a wrongful sale of land by defendant which plaintiff had mortgaged to defendant by a deed absolute in form and for refusing to permit plaintiff to redeem, where the court in one section of its instructions told the jury that the measure of damage was the difference between the sum of the liens on the land and the amount for which it was sold by defendant, provided it was not sold for less than its market value, and in another section that the measure was the difference between the market value at the time of sale and the price for which it was sold by defendant, and in another section that plaintiff was entitled to recover the entire purchase price with interest, and it does not appear which rule the jury adopted, even if any one of the rules laid down for the measure of damage was correct, the instructions are so conflicting that a verdict and judgment based thereon should be reversed.

2. Same.

In an action for damage for a wrongful sale by defendant of land held by him under a deed from plaintiff absolute in form but in fact a mortgage, and for refusing to allow plaintiff to redeem, where the answer tendered other issues and there was evidence tending to support them, it was error to instruct the jury that the only question before it was the measure of damage.

Appeal from the District Court of Boulder County.

Messrs. DUNCAN & ANDREWS and Messrs. IVES & HOUSTON, for appellant.

Mr. O. A. JOHNSON, for appellee.

Mr. T. M. ROBINSON, of counsel.

GUNTER, J.

This was an action to recover damages for an alleged breach of contract. Plaintiff had verdict and judgment. Defendant appealed. The complaint alleged that one Huggins owning certain real estate borrowed money of defendant and conveyed the real estate to her, that she executed a contract to recon-

vey to him all interest in the realty so acquired on the payment to her of the money borrowed with legal interest, that Huggins assigned this contract to plaintiff, that she made a tender of the money loaned with interest and demanded a reconveyance of the property, that defendant refused, and still refuses, to make the conveyance.

Judgment was prayed for damages claimed to have been sustained through the alleged breach.

Defendant denied that plaintiff had sustained any damage by the alleged breach of contract, and set up affirmatively the existence upon the property at the time of the conveyance from Huggins to defendant of a trust deed and tax liens, that whatever interest Huggins had in the property conveyed at the time of the alleged breach was inferior to such trust deed, tax liens and lien created by the loan of defendant, that the value of the property was less than such aggregate liens, therefore, no damage was sustained by failure to reconvey.

There was evidence tending to sustain the allegations of the respective parties. One of the material questions for the jury to determine was the amount of damage, if any, sustained by plaintiff through the alleged breach of the contract. It appeared that defendant had sold and conveyed the property to a third party. In one section of the instructions the jury was charged that the measure of damages sustained by plaintiff was the difference between the sum of the above mentioned liens and the amount for which defendant sold the property, provided the land involved was sold for not less than its market value. In another section of the instructions the jury was told that the measure of damages to be applied was the difference between the market value of the land at the time it was sold and the price for which it was sold by the defendant. In a third sec-

tion the jury was charged that the plaintiff was entitled to recover the entire purchase price paid to the defendant and interest thereon at 8 per cent. per annum since payment thereof. It is apparent these instructions were in conflict. The evidence was contradictory as to the amount of damages, if any, sustained by plaintiff. It is impossible to determine which one of the rules laid down for the measure of damages the jury adopted; if any one of the rules so announced were correct—which we do not hold—the conflict between them would necessitate a reversal. In another instruction the jury is told that the only question before it was the measure of damages. The assumption that this was the only issue was not justified; the answer tendered other issues, tending to support some of which there was evidence.

The judgment should be reversed.

Reversed.

[No. 2173.]

**McMULLIN v. THE BOARD OF COUNTY COMMISSIONERS
OF MONTROSE COUNTY.**

1. Officer's Fees—Right to Receive—Performance of Service.

The right of a public officer to demand and receive fees for services depends upon the rendition of the services.

2. District Attorneys—Fees—Performance of Service.

A district attorney is not entitled to demand and receive commission from a county upon a sum received by the county in settlement of a suit against the county treasurer and sureties upon his official bond to recover a shortage in the treasury fund, where the suit was brought by the county attorney and the only thing the district attorney did in connection with the suit was to request that his appearance be entered for the county which was done upon motion of the county attorney, the suit having been compromised and settled for a smaller sum than that claimed shortly after the entry of the appearance of the district attorney and dismissed by the county attorney, the district attorney taking no part in such settlement although the district attorney was ready and willing to perform any necessary service connected with said suit had he been requested to do so by the county attorney or commissioners.

Appeal from the District Court of Montrose County.

Mr. S. D. WALLING, Mr. H. M. HOGG and Mr. S. G. McMULLIN, for appellant.

Mr. JOHN GRAY, for appellee.

WILSON, P. J.

This case is presented upon an agreed statement of facts, from which the following appears: There being an alleged shortage in the funds of the county treasurer of Montrose county, amounting to \$12,222.93, the county attorney of said county by direction of the county commissioners instituted a suit in the district court of the county in the name of the people of the state of Colorado for the use of the board of commissioners against the treasurer and his bondsmen for the recovery of the amount of such shortage. There were in all eight defendants. Subsequently, three of the defendants appeared and filed motions to quash the summons which had been served upon them, alleging among other grounds therefor that the action was not brought nor the suit prosecuted by any party authorized to bring the same under the laws of this state; that during one of the days of the term of the court during which the action was pending, the plaintiff, who was the district attorney of the district in which Montrose county was situate, informed the county attorney that he believed it to be his duty to appear in the action, and thereupon on motion of the county attorney, the court entered plaintiff's appearance as district attorney for the plaintiff in that action. That thereafter the plaintiff as district attorney was at all times ready and willing to do whatever might be necessary with relation to said suit, and that neither the said John Gray, county attorney, nor the board of county commissioners of Montrose county ever thereafter re-

quested of him any action on his part, nor was any further action taken in said court until April 20, 1898, when said action was dismissed without prejudice by John Gray, attorney for the county commissioners, on account of payment by the defendants of the sum of \$10,250 into the county treasury of Montrose county for the use and benefit of the county of Montrose, in settlement of said suit. Thereafter the plaintiff presented to the county commissioners a bill for the sum of \$256.25, which amount he claimed as the commission allowed him by statute (Mills' Ann. Stats., sec. 1873), for the collection of the amount paid by the sureties on the treasurer's bond. This bill was disallowed by the commissioners, and plaintiff thereupon appealed to the district court where judgment was also rendered against him. He then appealed to this court, and the cause was upon motion transferred hence to the supreme court. From that court it was remanded to this court, but in doing so, the supreme court passed upon all of the material questions involved, save one.—*McMullin v. Board of Commissioners of Montrose County*, 29 Colo. 478, 68 Pac. 779.

In concluding its opinion the court said: "The necessity of determining whether this court has jurisdiction of the appeal has also made it necessary to pass upon one of the questions concerning which error is assigned, which is, that the district attorney under the statutes as they now exist had, as against the county attorney, power and exclusive authority to manage and control the action in the district court on the treasurer's bond. Because under the statutes he had, at least under the board's supervision, such power, it does not necessarily follow that he is entitled to the commission claimed. That depends, among other things, upon whether under the facts, he has earned it, upon which, of course, as we have not

jurisdiction of the appeal, we express no opinion.”

The sole question, therefore, presented to us for determination is whether under the facts plaintiff has earned and is entitled to the commission which he claims.

It may be conceded that the salary of a public officer is an incident to the office, power to collect and receive it depending upon the title to the office, if not also the actual occupancy of it. The fees of an officer may also be said to be an incident to the office, but not in the same sense as the salary. The right to demand and receive them arises from the rendition of the services.—*Smith v. The Mayor, etc.*, 37 N. Y. 520. By virtue of his office, he is empowered to earn fees and receive compensation for services rendered, but neither reason nor common sense would sustain the proposition that he would be entitled to demand or receive fees for services not rendered, nor to be rendered. Indeed, the policy of the law in this state with reference to district attorneys would seem to be that he would not be entitled to receive his salary even, until he first made a showing that he had performed during the quarter the official duties for which the salary was allowed.—Mills Ann. Stats., sec. 1560; Rev. Stats. 1868, p. 263, sec. 7.

In *Board of County Commissioners v. Graham*, 4 Colo. 203, the court said: “On the other hand, there is evidence in the law of an intent to compensate the district attorney only for effective labor, as for instance, etc.” It is true that the court used the language in connection with a discussion of the claims of a district attorney for fees for indictments, but we see no reason why because of this the language is not applicable to all duties of a district attorney acting in his official capacity.

This being a general and correct statement of the law in our opinion, the question is whether under it

and the stipulated facts, the plaintiff earned the commission and is entitled to recover. We think that upon the showing made, the answer must be in the negative. It does not appear that the plaintiff rendered any services at all. He simply acquiesced in the action of the county attorney in having his appearance entered as an attorney for the plaintiff commissioners. Indeed, it does not appear that subsequently any action at all was taken in the suit. There is no showing made either in the statement of facts or otherwise that the entry of plaintiff's appearance as attorney for the commissioners was the efficient moving cause of the subsequent payment by the defendants in the suit, or that it had any effect whatever upon it. We are not permitted by simple inference to say that it did. The reasonable and natural presumption from the facts stated is that the matter was compromised prior to any further proceedings or judgment, by the commissioners accepting some two thousand dollars less than the amount claimed. This compromise might not possibly defeat the claim of plaintiff if it appeared that he had rendered services, and that he was the moving cause of the compromise being effected and of the collection being made, but there is no such showing. The most that can be said of his claim is that he was ready and willing to render any necessary services when requested by the county attorney, or by the commissioners. This, however, is not sufficient to entitle him to recover. The statute under which he claims makes it his statutory duty to appear in behalf of the several counties of his district in suits and proceedings pending in the district court in any county within his district wherein the county may be a party. We know of no law which would require the county commissioners or the county attorney to request him to perform a statutory duty, and it certainly could not

be contended that a district attorney could do nothing in a county suit, and then after suit was ended demand his fees upon the ground that he was ready and willing to have performed the services, and discharge his statutory duty if he had been requested so to do. Under the statute, as we have said, it is his express duty to appear in the suit, and under the decision of the supreme court neither the county commissioners nor the county attorney had the power to exclude him.

For the reasons given, we think the judgment of the district court was correct, and it will be affirmed.

THOMSON, J., not sitting.

Affirmed.

[No. 1977.]

WEISS ET AL. V. GULLETT ET AL.

Contracts—Liens—Sales.

Where the owners of certain mining claims contracted with attorneys to pay them a certain fee for services connected with said claims and agreed to pay the same out of the purchase money to be received from the sale of said property, a certain per cent. of said purchase money to be paid to said attorneys as it was received and the balance of their stipulated fee to be paid when the final payment was made of the purchase price, and providing that said attorneys were "to receive and be interested in the purchase money on said mine to the extent of" the designated sum, the contract did not create a lien on said mining claims, nor operate to transfer an interest in the purchase money until after it should come into the hands of the vendors, and no right of action accrued in favor of said attorneys against the purchasers of said mining claims who purchased with notice of such contract.

Appeal from the District Court of Gunnison County.

Mr. J. M. McDUGAL, Mr. CHARLES J. HUGHES, Jr., Mr. GERALD HUGHES, for appellants.

Mr. ALEXANDER GULLETT, Messrs. TEMPLE & CRUMP, for appellees.

THOMSON, J.

On the 7th day of April, 1897, Adam J. Weiss instituted a proceeding in equity against William J. Wolfe and others to obtain a decree vesting in him the title to a one-half interest in the Good Hope and Mammoth Chimney lode mining claims, situate in Gunnison county. He claimed the interest by virtue of an alleged contract between himself and certain of the defendants by whom the claims were located. Alexander Gullett and S. D. Crump were made parties defendant because of a contract between them and the other defendants, which will appear hereafter. Gullett and Crump interposed a cross-complaint, in which they set forth the contract referred to, and alleged that on the 7th day of March, 1897, the defendant Wolfe executed to one R. B. Wallace a deed conveying to him an undivided one-fourth interest in the two claims, which deed was immediately recorded; that the interest was conveyed to Wallace for the use and benefit of the plaintiff, Weiss; and that the purpose of the transaction was to defraud the cross-complainants and was the result of a conspiracy for that purpose between Wallace, Weiss and Wolfe. A decree was prayed investing the cross-complainants with a lien on the property described in their contract, for \$1,200, and directing a sale of the property to satisfy their claim. Personal judgment for the amount against the plaintiff and Wallace was also prayed. The court, after finding that the facts entitled the cross-complainants to a lien as prayed, and that the charges of conspiracy and fraud were true, decreed a lien in their favor upon an undivided one-fourth of the property, and gave them a personal judgment against the plaintiff and Wallace for the amount of their claim. The plaintiff and Wallace have appealed to this court.

What became of the original suit we are not advised. Only the record relating to the controversy

between the appellees and the appellants is before us.

The following is the contract on which the appellees base their claim:

“This agreement, made and entered into this 10th day of June, A. D. 1895, between W. J. Wolfe, J. S. McCullough, Andrew Scheff and Viola A. Duckett, parties of the first part, and Alexander Gullett and S. D. Crump, parties of the second part, witnesseth: That for and in consideration of the sum of five thousand dollars, to be paid as hereinafter provided by the said parties of the first part to the parties of the second part, it is hereby agreed by and on the part of the said parties of the second part to do and perform all legal services in connection with the title of the said first parties in that mining property known as the Mammoth Chimney lode mining claim and the Good Hope lode mining claim situate in Domingo mining district, county of Gunnison and state of Colorado, and said parties of the second part are to act as counsel and attorneys for the said first parties, jointly and severally, in all litigation which may arise in any way affecting the title of the said first parties to said mining claims, or either of them, or affecting the title of any one of the said first parties thereto; and are, in all matters pertaining to said title and the rights of the first parties, to protect, to the best of their ability, the same and all the ground included within the territory now comprised within the boundary lines of said locations. It is agreed on the part of the first parties hereto that said sum of \$5,000, to wit, twenty-five hundred dollars to each of the said second parties, shall be paid as follows: Ten per cent. out of all payments to be made to the said first parties on the purchase money of said Mammoth Chimney lode; and when the final payment of said purchase money shall be made, then the balance of said \$5,000 shall be paid; it being understood that in case the bond and option

now held by J. O. H. Spinney shall be taken up, and the purchase money paid thereunder, that the payments amounting to \$5,000, as hereinbefore provided, shall be made out of the purchase money stipulated in said option. And it is further agreed, that in case said option shall not be taken up, then the parties of the second part are to be paid out of the purchase money to be received for said Mammoth Chimney lode, the said sum in the same manner, to whomsoever the same may be sold, and the said parties of the second part are to receive and be interested in the purchase money on said mine to the extent of said \$5,000 for services aforesaid; it being the agreement that one-fourth of said \$5,000 is to be paid by each of the parties of the first part.

“In witness whereof, the parties have hereto set their hands and seals the day and year first above named. The obligations herein are to continue until said first parties shall have disposed of both of said mining claims.

“Wm. J. Wolfe. (Seal.)
“J. S. McCullough. (Seal.)
“Andrew Scheff. (Seal.)
“Viola A. Duckett. (Seal.)
“S. D. Crump. (Seal.)
“Alexander Gullett. (Seal.)”

The evidence was that Mr. Weiss obtained the money to purchase Wolfe's interest from Mr. Wallace, who was a banker at Monte Vista, giving Wallace a note for the amount, signed by himself and his brother, and securing payment of the debt by causing the deed to be made to Wallace. Of course the deed amounted only to a mortgage. It is claimed that Weiss and Wallace both had knowledge of the contract; and it is inferable that the charge of fraud is based on the supposed fact of such knowledge. We have discovered nothing else which might serve as an

excuse for the charge, or for the finding of conspiracy in the decree. But whether those parties had knowledge of the contract or not, is, in our view, altogether unimportant. As we read the contract, it gave the appellees no claim upon the land, nor upon the purchase money until after it should have passed from the purchaser. The appellees acquired no interest of which the sale by Wolfe, and the purchase by Weiss, could possibly defraud them.

Two contingencies were contemplated by the contract—one, the purchase of the property by Spinney under an option held by him and the other a forfeiture of the option and a sale to some other person. It was conceded on the oral argument by counsel for the appellees that so far as the first provision was concerned, the language employed amounted only to a personal covenant of the proposed vendors that they would pay the appellees after the purchase money should be received by them; but that, by the language of the second, an interest in the purchase money to the extent of the amount owing to the appellees, was transferred to them. The option was forfeited, and a sale was made to another person, namely, Weiss; and it is contended that their interest attached to the fund in his hands, or in the hands of Wallace, who advanced the money and to whom the legal title was conveyed. The following is the phraseology on which counsel rely in support of their contention: “And the said parties of the second part are to receive and *be interested* in the purchase money on said mine to the extent of said \$5,000.” What this clause was intended to mean must be found in the entire sentence of which it is a part. The sentence begins with an agreement, “that in case said option shall not be taken up, then the parties of the second part are to be paid out of the purchase money to be received for said Mammoth Chimney lode, the said sum, in the

same manner, to whomsoever the same may be sold.” This language refers us back to the agreement immediately preceding it. The “said option” and the “said sum are the option and sum mentioned in that agreement, and the “same manner” is the manner there specified. In each case, therefore, the appellees were to be paid in the same way; and according to counsel’s concession, under the first of the agreements, they were to be paid by the vendors after the money had passed into the hands of the latter. And, in this connection, the stipulation that the appellees were to be paid out of the money to be received for the lode is significant. The money could not be paid until it should be received. But by whom was it to be received? Manifestly, by the parties making the sale; so that the interest which counsel say was transferred to the appellees, could not pass until after the vendors had received the money.

We have confined ourselves to a discussion of those two special agreements, because counsel have done so; but the question which has been raised is settled by the statement, at the very outset of the instrument, of the consideration for the services to be rendered by the appellees. That consideration was, “the sum of \$5,000, to be paid *as hereinafter provided, by the said parties of the first part to the parties of the second part.*” The subsequent provisions referred to, being the two agreements which we have noticed, simply designate the fund out of which payments were to be made, and the proportions from time to time payable; but when the contingency should arise upon which they were payable, it was from the parties of the first part that payment must come. That the money was to be paid out of a fund gave the appellees no interest in the fund until it should come into the possession of the other parties. When the latter should receive it, and not before, the claim of

the appellees would be enforceable; but the contract did not create a lien upon the mine, or operate to transfer an interest in the money until after it should come into the hands of the vendors; and no right of action accrued to the appellees against the appellants. —*Christmas's Adm'r v. Griswold*, 8 Ohio St. 558; *Christmas v. Russell*, 14 Wall. 69; *Trist v. Childs*, 21 Wall. 441; *Silent Friend Mining Co. v. Abbot*, 7 Colo. App. 73.

The judgment will be reversed and remanded, with instruction to dismiss the cross-complaint.

Reversed.

[No. 2188.]

THE WESTERN NATIONAL BANK OF PUEBLO V. THE
STATE BANK OF ROCKY FORD ET AL.

Gambling Contracts—Bank Certificate of Deposit—Indorsement.

Under section 1344, Mills' Ann. Stats., an indorsement and transfer of a bank certificate of deposit in payment of money lost at gaming is absolutely void and vests no title to the certificate even in an innocent purchaser.

Appeal from the District Court of Pueblo County.

Mr. WILLIAM B. VATES, for appellant.

Mr. JOSEPH DYE, for appellee Lou Turner.

WILSON, P. J.

The following facts were practically undisputed. Mrs. Lou Turner, one of appellees, gave to her husband, R. J. Turner, \$360 of her own money to deposit for her in the State Bank of Rocky Ford, one of appellees. Turner deposited it as requested, but took a certificate of deposit therefor in his own name, which he delivered to his wife, and which she placed in her trunk. She did not notice that the certificate, which was payable on demand, was in the name of her husband. Shortly afterwards, without her knowl-

edge or consent, Turner took the certificate of deposit from the trunk, went to Pueblo, and gambled it off at the game of faro in the gambling house of Gray & Company. Mrs. Turner, learning the fact on the next day, went to Pueblo and demanded from Gray & Company the return of the certificate, which was refused. She and her husband thereupon notified the Rocky Ford bank not to pay the certificate if presented. Within a few days thereafter, Gray & Company sold the certificate to the appellant bank, receiving the full value thereof. It appears that at the time of this purchase, the appellant bank had no knowledge or notice of any infirmity which attached to the assignment of the certificate. In the regular course of business, the certificate was presented to the Rocky Ford bank, and payment was by it refused. It then commenced this action in the nature of an interpleader, making all of the parties mentioned defendants, and praying that they be required to come into court and adjudicate their claims to the certificate, payment of which it professed its readiness to make at any time to whomsoever was determined to be the lawful owner. The decree of the court was that the assignment having been for a gambling consideration, was void and passed no title, and that the certificate was the property of Mrs. Turner, and from this an appeal was taken by the appellant purchaser of the certificate.

Our gambling statute, after providing that all contracts, promises, agreements, conveyances, securities and notes made, executed, etc., where the whole or any part of the consideration shall be for money or property won by gaming, or by playing at cards, or by any gambling device or game of chance, etc., shall be utterly void and of no effect, proceeds as follows: "No assignment of any bill, bond, note or other evidence of indebtedness, where the whole or

any part of the consideration for such assignment shall arise out of any gaming transaction, shall in any manner offset the defense of the person or persons making, entering into, executing or giving such instrument so assigned, *or the remedies of any person interested therein.*”—Gen Stats., sec. 850; Mills' Ann. Stats., sec. 1344.

This statute has been in force for many years, and was taken literally from the statute of Illinois.—Hurd, Revised Statutes of Illinois, chap. 38, secs. 131, 136. Both before and subsequent to its adoption in Colorado, it has been interpreted by the supreme court of Illinois.—*Williams v. Judy*, 3 Gilman, 284; *Chapin et al. v. Dake*, 57 Ill. 298.

In each case it was held that a contract tainted with a gambling consideration was absolutely null and void, even in the hands of an innocent purchaser for value. The Chapin case was almost precisely similar to the one at bar. There genuine bank drafts had been lost at gambling, and the court held that the endorsement or assignment of the drafts was void, and did not serve to transfer the title in them. It held in effect that the endorsement of the drafts was a contract or agreement between the parties. The same has been held by this court in a very recent case, the opinion in which was handed down at this term.—*D. Sullivan et al. v. German National Bank of Denver, Joshua H. Wilbraham et al.*, ante, 99.

The consideration of the contract of endorsement in this case coming within the prohibition of the statute, it was null and void, and through it therefore the appellant bank secured no title. No more effect could be given to it, as was said in the Dake case, than to a forged endorsement. The contract of assignment being void by express statute, it was stricken with nullity at its birth, and could gather no

vitality by circulation.—*Boughner v. Meyer*, 5 Colo. 73; Daniel on Negotiable Instruments, § 197.

The views which we have expressed have already been announced both by this court and by the supreme court.—*Boughner v. Meyer, supra*; *Bank v. McClelland*, 9 Colo. 611; *Ayer et al. v. Yunker*, 10 Colo. App. 27.

In the *Boughner* case Chief Justice Thatcher said: “The provisions of this section are very broad and sweeping. Even in the hands of *bona fide* purchasers, negotiable paper founded in whole or in part upon a gambling or gaming consideration, within the meaning of this section, is utterly void.”

If a negotiable instrument is void because of a gambling consideration, so must also be an assignment or endorsement, because it is a contract indisputably, and hence comes within the express language of the statute.

It is possibly true that this sweeping statute may under certain circumstances work hardship in the commercial world, but courts are powerless to relieve. The remedy, if any is desirable, rests with the legislature alone. Of course where innocent purchasers are involved, the effect of the statute should not be extended to cases not fairly within its provisions, but where the case, like this, comes squarely within the terms of the statute, there is but one course for the court to pursue.

The judgment was right and will be affirmed.

Affirmed.

[No. 2181.]

MILLER V. THE OURAY ELECTRIC LIGHT AND POWER
COMPANY ET AL.

1. Negligence—Electricity—Defective Wiring—County Jail—Injury to Prisoner by Fire—Pleading.

Where a prisoner in a county jail was suffocated and killed by the burning of the jail, in an action against an electric light

company a complaint which alleged that the company placed wires in the building and transmitted a current of electricity over them for the purpose of lighting the building, that the wires were negligently and unskillfully placed, reciting the facts upon which said charge of negligence was based, and that by reason of said negligence the building was set on fire and burned, causing the death of plaintiff's decedent, stated a cause of action against said company.

2. Same—Duty of County Commissioners—Notice—Pleading.

In an action against the individual commissioners of a county for the wrongful death of a prisoner in a county jail caused by the burning of the jail, based on the failure of said commissioners to personally examine said jail, a complaint which fails to allege that said commissioners had knowledge or could by proper examination have had knowledge of the dangerous condition which caused the fire, and fails to allege in what respect the failure to make the examination contributed to cause the fire, is defective.

3. Negligence—County Commissioners—Duty to Examine Jail—Injury to Prisoner by Fire—Liability of Commissioners.

Section 2523, Mills' Ann. Stats., requiring county commissioners to make personal examination of the county jail, its sufficiency and management at each session of the board and to correct all irregularities and improprieties therein found, imposes a public official duty and the commissioners are not individually liable thereunder to an action for damages for the death of a prisoner caused by the burning of the county jail, alleged to have been caused by their negligent failure to make such examination.

Error to the District Court of Ouray County.

MESSRS. STUART & MURRAY and MESSRS. STORY & STORY, for plaintiff in error.

MESSRS. HENRY & SIGFRID, for defendants in error.

WILSON, P. J.

While Harry W. Hawkins, a minor, was confined in the jail of Ouray county, charged with a criminal offense, the building caught on fire and he suffered death from suffocation. The fire is charged to have

been the result of defective electric wiring of the building. Mrs. Miller, the mother of the deceased, brought this suit to recover damages for the alleged negligence which caused the death of her son, joining as defendants The Ouray Electric Light and Power Company, the three county commissioners as individuals, the sheriff, and the sureties upon his official bond. The electric light company interposed a demurrer to the complaint, as did also the county commissioners. Each of these demurrers was sustained upon the ground that as to those parties the complaint did not state facts sufficient to constitute a cause of action, and this question alone is involved in the appeal to this court.

Those portions of the complaint which will be sufficient for the understanding of this opinion are as follows:

“2. That at all of the times hereinafter mentioned the defendant, The Ouray Electric Light and Power Company, is and was a corporation maintaining and operating an electric lighting plant and furnishing electric light in the buildings within the city of Ouray, in the county aforesaid, and as a part of said business, it from time to time furnished and placed in the buildings in said city wires for conveying the electrical current used in lighting the buildings, and representing that it had skilled and educated workmen with sufficient electrical knowledge to place in said buildings the necessary wires, over which to convey the electric current used for furnishing light in such manner that there would be no danger therefrom and that such wires would be properly and safely insulated from the buildings and from each other, and was charged with the duty of providing skilled workmen, having sufficient knowledge in the use of electricity, to wire the buildings in such manner as would enable the current to be de-

livered over said wires with safety to the occupants and to said buildings.”

“8. That at the time of the arrest, imprisonment and death of said Harry W. Hawkins, the only county jail within and for said county of Ouray was a building wholly built of wood, tar-paper and other inflammable materials, containing an iron and steel cage or cages in which the prisoners were confined; that no beds were provided in said jail, excepting bunches of dry hay placed in said cages during the night time and stowed in the corridor of the building outside of said cages when not in use for beds; that said building was not provided with any proper means of ventilation; was wholly unfit for the purposes for which it was used; was artificially lighted by currents of electricity sent over wires placed in said building and connected with its electric light plant by the defendant, The Ouray Electric Light and Power Company; that said wires were carried into said building by said defendant by passing them through a knot hole in the side of the building, without protecting said wires from chafing and rubbing, and the wires inside of said jail building were placed and left in contact with the inflammable materials of which said building was constructed and in contact with each other, and were not properly protected so as to prevent said wires from short circuiting and setting fire to said building, and said wires were allowed to become worn and bare and in direct contact with each other and the inflammable materials in said building. And by reason of the unskillful and grossly negligent manner of so conducting and placing the wires in said jail building; leaving of said wires without proper insulation, and in contact with each other and the inflammable materials of said building, and the sending of currents of electricity over said wires, as well as by reason of the inflammable

materials of which said building was constructed, and the keeping and storing of dry hay in said building, said building was in constant and imminent danger of taking fire, both from within and without, and of burning and suffocating the prisoners kept therein. That the only keys provided for the opening of said building and of the cages therein were carried by the sheriff and his deputy, and the said sheriff and his deputy frequently and habitually went away from said building for many hours at a time; and during the time herein specified it was the regular habit and practice of said sheriff and his deputy to lock the prisoners in their cages for the night, to close and fasten all the doors and shutters of said jail building and then go their several ways to their homes to remain until morning, taking said keys with them and to leave said prisoners fastened therein wholly unprotected and unattended from any danger which might threaten them; of all of which facts the said defendants had full knowledge."

"10. That The Ouray Electric Light and Power Company in conducting the wires in said building; in placing and leaving the same therein in manner above specified; in transmitting currents of electricity over said wires, so negligently, unskillfully and improperly placed and kept, was grossly negligent and derelict in the duties imposed upon it, and that said negligence resulted in setting fire to said building, and in causing the death of the said Hawkins. And the said Lyon, King and Couchman were grossly negligent and derelict in the duties required of them, in that they wholly failed and neglected to provide a proper county jail and beds therein; to see that said building was properly and safely lighted; to see that proper care was taken for the safety of the prisoners confined therein, and in that they wholly failed at each session of the board of county commissioners to

visit the county jail and make a personal examination of its sufficiency, the management thereof, and to correct all irregularities found therein.”

It will be observed that the complaint specifically charges the electric light company with having placed and carried the wires into the jail, and with transmitting a current of electricity over the wires for the purpose of lighting the jail at the time of the fire. It also specifically charged that said company was grossly negligent in the placing of said wires, and recites the facts upon which said charge of negligence is based. It also alleges that the defendant light company was charged with the duty of providing skilled workmen to wire buildings in such manner as would enable the current to be delivered over said wires with safety to the occupants therein, but that said wires were not so placed. In a recent case decided by this court it was said: “We cannot say, as a matter of law, that proof would not be admissible under the averments of the complaint which would justify a verdict that in leaving the wire exposed as alleged, the defendant was guilty of negligence. If such proof would be admissible, then the complaint, in so far as the charge of negligence is concerned, is sufficient.”—*Walters v. Electric Light Company*, 12 Colo. App. 146.

Upon principle, as well as upon the material facts of negligence involved, the case was very similar to this, and we think the decision of that is not only applicable, but conclusive here. Under the allegations of the complaint, proof would be clearly admissible of the acts charged as constituting negligence, and it would be for a jury to determine as to whether they did constitute it. If it would avail the defendant company at all to show that the building was wired in accordance with the specific directions of the official or officials having charge of the jail, that

would be a matter of defense, and to be set up as such by the defendant. In our opinion the court erred in holding that the complaint did not state facts sufficient to constitute a cause of action against the electric light company.

The plaintiff bases her claim of the individual liability of the commissioners upon the following section of the statutes:

“It shall be the duty of the county commissioners to make personal examination of the jail of their county, its sufficiency, and the management thereof during each session of the board, and to correct all irregularities and improprieties therein found.”—Gen. Stats., sec. 1829; Mills’ Ann. Stats., sec. 2523.

It is insisted that this section imposes a double duty upon the commissioners—an obligation to the public, and another to the individual interested, to wit, the prisoner who may be confined within the jail. The complaint in our opinion is defective as to these commissioners, because it does not allege knowledge on their part that the condition of the lighting in the jail was defective or dangerous, nor that they had or could have had such knowledge, if they had made the personal examination which it is alleged they failed to make, nor in what respect their alleged failure to make the required inspection contributed to the accident. It may be conceded that they utterly failed to make these visits to the jail, but yet if such failure was not a contributing cause to the injury, it could not be claimed that they were in any manner liable. There is, however, in our opinion a still more serious objection to the complaint. The duty imposed by this section of the statute was, we think, a public, official duty imposed upon them as a board of county commissioners. If the principle contended for by plaintiff were established, it would lead to absurd and most unreasonable results. We do not believe it to

have been in the contemplation of the lawmakers, and we know of no authority to that effect, that one or more of the county commissioners might be subjected to an action against him or them individually for damages, because a prisoner in the county jail claimed that the food or bedding with which he had been supplied was not of a proper character, or was injurious to his health, or that the building in which he was confined was so defective in its construction as to produce a like result. Actions of this character could be maintained if the present one could, the county commissioners being specially charged as a board of county commissioners representing the county, with the duty of building and keeping in repair county buildings, with the care of all county property, and with the management of the business and concerns of the county.—Gen. Stats., sec. 538; Mills' Ann. Stats., sec. 791.

The quoted section in regard to the jail confers upon them no additional power, but simply requires them to make personal examination of it at stated periods. This is an official duty, owing to the public by virtue of their office, and for a breach of it the statutes specifically provide a remedy by suit upon their official bonds.—Mills' Ann. Stats., sec. 825.

The words "and to correct all irregularities and improprieties therein found" impose no new obligation upon them. This would have been their duty if these words had not been used, by virtue of the statute requiring them to keep public buildings in repair and charging them with the care of all county property, and with the management of all business and concerns of the county. If the contention of plaintiff be the law, then each individual commissioner would be liable in like actions to this, because of damages suffered by an individual by reason of alleged defects in a public highway or in a county bridge, or

in any public building, or in the public grounds in which it might be situate. To so hold would tend in the large counties of the state, at least, to bring about, as was said by the supreme court of Idaho, "the literal abrogation of the office of county commissioner, for no sane man would assume the position with such a liability attached."—*Worden v. Witt et al.*, 39 Pac. 1114.

The duty imposed by the statute under consideration being with reference to the care, custody and supervision of public property, it would seem clear that the county commissioners as to the performance of that duty come within the class of public officers who are recognized by the authorities as subordinate governmental officers and administrative agents whose duty is owing primarily to the public collectively—to the body politic and not to any particular individual—who act for the public at large.—*Mechem on Public Officers*, § 590, *et seq.*; *Cooley on Torts*, p. 442; *Shearman and Redfield on Negligence*, § 302.

This being true, a breach of the duty here charged will not support an individual action for damages against the commissioners. Mr. Cooley authoritatively lays down this doctrine, and it is supported by the great weight of authority, and so even in cases where a nonperformance of the duty might prejudice an individual. This is held not to constitute a private wrong for which the injured party could have redress by individual action.—*Cooley on Torts*, 2d ed., p. 446, *et seq.*; *Mechem on Public Officers*, §§ 598, 599, 606; *Shearman and Redfield*, *supra*. The court did not err in sustaining the demurrer of the county commissioners.

For the reason, however, that the demurrer of the electric light company should not have been sustained, the judgment will be reversed, and the

cause remanded for further proceedings in accordance with the views which we have expressed.

Reversed.

[No. 2163.]

RICHARDSON V. BOOT.

1. Banks—Liability of Stockholders—Pleading.

In an action against a stockholder of an insolvent banking corporation to enforce his individual liability for a debt of the bank, the complaint must allege the number of shares of stock issued by the insolvent corporation, the number held by the respective stockholders, the amount of the debts of the bank for which the stockholders are liable, together with the dates when created; and a complaint which failed to allege these facts was insufficient to support a judgment, and a demurrer thereto was properly sustained.

2. Banks—Liability of Stockholders—Equity Proceeding.

The only proceeding through which complete relief can be administered under the statute, making the stockholders of an insolvent banking corporation liable for its debts, is an equitable one brought by one creditor in behalf of all others similarly situated against all the stockholders.

Error to the District Court of Montrose County.

Mr. H. C. ALLEN, for plaintiff in error.

Mr. S. S. SHERMAN, for defendant in error.

GUNTER, J.

A general demurrer to the complaint was sustained, and from the order dismissing it plaintiff is here on error.

This was an action at law by a single creditor against a single stockholder of an insolvent bank to recover against the stockholder individually upon certain certificates of deposit.

The complaint alleges the existence of a banking corporation organized under the state laws; that defendant was at a certain date a stockholder in said bank to the amount of ten shares at a par value of one

hundred dollars per share. It further alleges that while defendant was such stockholder certain certificates of deposit were issued by the bank to plaintiff's endorser; that thereafter defendant transferred his stock in the bank, and within one year after such transfer the bank became insolvent.

This action was instituted, as above stated, to recover of defendant individually. The statute relied upon to justify a recovery is as follows:

"The * * * stockholders of every banking corporation formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being * * * stockholders of such corporation, *equally* and *ratably* to the extent of their respective shares of stock in any such corporation * * * except that when any stockholder shall sell and transfer his stock such liability shall cease at the expiration of one year from and after the date of such sale and transfer."—Mills' Ann. Stats., vol. 1, sec. 518.

As seen from this statute the recovery had against each stockholder must be "equally and ratably to the extent of their respective shares of stock in any such corporation." Such recovery can be had only by giving the court information upon which to base it. In addition to other facts the complaint must allege the number of shares of stock issued by the insolvent corporation; the number of shares held by the stockholders respectively; the amount of debts of the corporation for which defendant and other stockholders are liable, together with the dates when created, otherwise it is impossible to know the amount for which judgment should be rendered against a stockholder. The complaint here does not inform us of the number of stockholders, the stock held by them respectively, the total issue of stock, nor the amount or dates when incurred of the indebtedness of the in-

solvent corporation, and but the one stockholder is made a party to the proceeding.

The above information is essential to the complaint stating facts sufficient to constitute a cause of action. Had the defendant defaulted below no judgment could have been entered against him in any sum upon the complaint as framed, because it could not be ascertained therefrom the proportion of the claim of plaintiff for which defendant was "equally and ratably" liable.

We agree in the conclusion of the lower court that the complaint did not state facts sufficient to constitute a cause of action.

The weight of authority with the better reasoning is that the only proceeding through which complete relief can be administered under this statute is an equitable one brought by one creditor in behalf of all others similarly situated against all stockholders.

While the suit ruled in *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, was under another section of the statute, the reasoning in that case is applicable to an action under the statute here involved.

Judgment affirmed.

Affirmed.

[No. 2161.]

THE CITY OF DENVER V. MURRAY.

1. Cities and Towns—Negligence—Instructions—Defect Cured.

In an action against a city an instruction that the city was "bound to use all reasonable care, caution and supervision to keep its streets and sidewalks in safe condition for travel, in the ordinary modes of travel," was not misleading because it failed to qualify the word "safe" with the word "reasonably." But if it was faulty it was cured by a subsequent instruction in which the accurate phraseology was employed.

2. Instructions—Omission—Failure to Request.

Where an instruction was correct as far as it went and the only objection to it is that it did not go far enough, it is too late to complain of the instruction on appeal where the com-

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plaining party did not ask the trial court to supply the omission.

3. Cities and Towns—Negligence—Notice—Instructions.

In an action against a city where the undisputed facts showed that the dangerous obstruction of the street complained of had existed for such a length of time that the city was charged by law with notice and with the duty of removing it and it would have been proper to so instruct the jury, the city is not in a position to complain of an instruction given upon the question of notice.

4. Instructions—Conclusively Established Facts.

An instruction is faulty which leaves conclusively established facts to the jury.

5. Cities and Towns—Obstruction of Streets—Instructions.

In an action against a city for an injury caused by the falling of a derrick where the undisputed evidence showed that the derrick stood in the street in close proximity to a schoolhouse and was attractive to the school children, who were in the habit of playing upon it, it was not erroneous for the court to refer to the derrick as "said obstruction."

6. Same.

In an action against a city for injuries to a child caused by the falling of a derrick which had been left standing in the street in close proximity to a school which was attended by plaintiff for at least a year, and which was attractive to the children to play upon, the fact that the derrick was tied to a stump by a rope which was liable at any time to be severed accidentally or heedlessly by the children playing upon it did not palliate the negligence of the city in failing to have it removed, and it was not error for the court to instruct the jury that it was immaterial whether or not it was tied.

Appeal from the District Court of Arapahoe County.

Mr. J. M. ELLIS, Mr. GUY LE R. STEVICK, Mr. DAVID G. TAYLOR, Mr. H. M. ORAHOD (city attorney) and Mr. C. P. BUTLER, for appellant.

Messrs. WARD & WARD, for appellee.

THOMSON, J.

On the 31st day of January, 1898, Charles D. Murray, a child seven years of age, was seriously injured by the falling upon him of a derrick situated in a public street of the city of Denver. By his next

friend he brought suit to recover damages for the injury. The facts disclosed by the evidence are these: Elbert C. Cliff was the owner of a derrick, made of heavy timbers, five or six feet in width at the bottom, and about three feet at the top, twenty-five or thirty feet long, and constructed for the purpose of raising and lowering heavy safes. Mr. Cliff kept this derrick in the street in front of his yard, outside and near the edge of the sidewalk, a portion of the time lying down, and a portion of the time standing in an inclined position, and leaning against a stump. Prior to the accident the derrick had been in the street for at least a year, and standing up, leaning against the stump, for two or three months. Part of the time it was fastened to the stump by a rope. The rope was there when the accident occurred, but it had parted by reason of rottenness, or had been cut. A number of poles were lying on the ground under the derrick, and had been there for two or three years. There was a public school building on the corner diagonally opposite Cliff's premises and the place occupied by the derrick, in which a large number of children were taught, among whom was young Murray. The derrick seems to have had a special attraction for those children, for they were in the habit of playing upon it, climbing to its top and swaying it. They had been warned by the principal that there was danger in playing on it, but the warning does not seem to have had much effect. It was heeded, however, by the plaintiff. About one o'clock in the afternoon of the day of the accident, the plaintiff, while on his way to school, stopped a short distance from the school house to play marbles with some other boys. While he was playing the school bell rang, and to avoid being late he started rapidly towards the schoolhouse, taking the shortest route. His course led him across the ground over which the derrick was leaning; as he

came under it, he stumbled on one of the poles lying on the ground, and at that instant the derrick toppled over and fell on him, inflicting the injury of which he complains.

The action was brought against the city and Cliff jointly. The complaint stated the facts substantially as the evidence showed them, and charged the city with negligence in suffering the derrick to remain upon the street. The answer of the city, after denying all the allegations of the complaint, averred contributory negligence on the part of the plaintiff. The jury returned a verdict against both defendants, and judgment was entered accordingly. The city alone appeals.

Error is assigned to each of the several instructions given at the plaintiff's request. Except as to the admission of some testimony to which the city objected, and the objections to which are now abandoned, no other error is assigned. Only a few of the instructions are noticed in the argument. The objections to the others are therefore waived.

1. The fourth instruction, given at the request of the plaintiff, was that the city was "bound to use all reasonable care, caution and supervision to keep its streets and sidewalks in safe condition for travel, in the ordinary modes of travel." The objection to this is that it does not qualify the word "safe" by the word "reasonably." In *Boulder v. Niles*, 9 Colo. 415, it is said that it is the duty of the municipality to keep its avenues of travel in a reasonably safe condition for the modes of use to which they are subjected. We hardly think the jury could have been misled by the instruction. The difference between using reasonable care to keep the streets in a safe condition, and the keeping of the streets in a reasonably safe condition, is not very palpable. But if the instruction was faulty, its defects were cured by the

thirteenth instruction, given at the instance of the defendant, in which the accurate phraseology was employed.

By the fifth instruction the court advised the jury that there could be no recovery against the city, unless the unsafe condition of the street was actually known to the city, or had existed for such a length of time prior to the accident that the city, by the exercise of reasonable care and prudence, ought to have discovered it. It is contended that no liability could attach to the city until, after actual notice, or lapse of a sufficient period to raise a presumption of notice, it had failed to use reasonable diligence to render the street safe; and that because the instruction omitted so to state, it was fatally defective. No fault is found with the instruction as far as it went; the objection is that it did not go far enough. But the city did not ask the court to supply the omission, and it is too late now to complain of it.—*Mining & Milling Co. v. Prentiss*, 25 Colo. 4.

However, there is another answer to the objection. Upon the undisputed facts, the derrick and poles had encumbered the street for such a length of time that the city was charged by law with notice of their presence, and with the duty of causing their removal before the accident occurred; and it would not have been error to so instruct the jury.—*Denver v. Hyatt*, 28 Colo. 129. The city is not in a position to complain of the instruction as it was given.

The court also instructed the jury that the liability of the city was the same whether the derrick was tied with a rope or not; and in the course of the instruction, after submitting the questions whether the derrick was in the street, in proximity to a public school, and was a contrivance attractive to children, incidentally referred to it as "said obstruction." Counsel say that the court invaded the province of the

jury in assuming the derrick to be an obstruction, and also erred in saying that it was immaterial whether it was tied or not. The instruction was faulty in leaving conclusively established facts to the jury. That the derrick was in the street, in proximity to a schoolhouse and attractive to children, was not left an open question by the testimony. But the objections taken by the city are not tenable. The location of the machinery made it an obstruction. The evidence left no room for doubt as to that. And taking into consideration the location and construction of the contrivance, and the temptation it offered to children, as something desirable to play upon, we do not think the fact that it was tied by a rope, which was liable at any time to be severed accidentally, or heedlessly, by the children playing upon it, tends to palliate the negligence through which the machine was suffered to remain.

The question of the plaintiff's contributory negligence was properly submitted, and upon the evidence, the verdict was manifestly right.

The judgment will be affirmed. *Affirmed.*

WILSON, P. J., not sitting.

[No. 2176.]

18	147
20	573

THE NEWLON-HART GROCER COMPANY v. PEET.

1. Appellate Practice—Findings—Conflicting Evidence—Promise to Pay Debt of Another.

The finding of the trial court as to whether or not a party promised to pay the debts of others made upon conflicting testimony is conclusive upon the appellate court.

2. Attachment—Non-Resident—Change of Residence—Evidence.

A finding of the trial court that a defendant in an attachment suit was a resident of the state so as to defeat an attachment based on the ground of non-residence is supported by evidence which shows that defendant had been a resident of the state for a number of years, that he had gone out of the state and was absent from the state when the attachment was sued out,

and where defendant and his wife testified that he had only temporarily left the state to accept a three months' job of work, leaving his household goods in the state.

Appeal from the County Court of Pueblo County.

Mr. W. B. McNEAL, for appellant.

Mr. H. P. VORIES, for appellee.

WILSON, P. J.

Plaintiff company was engaged in the grocery business in the city of Pueblo. It is claimed that the defendant while in its employ as bookkeeper and confidential clerk assumed and promised orally to be responsible for and pay several small accounts of individuals to whom he had extended credit. This suit was brought upon that promise. It was instituted in a justice court, and by attachment. There were of course no written pleadings. Judgment both upon the merits of the case and upon the attachment, was in favor of the defendant. Upon appeal to the county court, a similar judgment was rendered. Counsel for plaintiff correctly state that the two leading questions involved and which are decisive of the case, are: Was the defendant indebted to the plaintiff in any sum at the time suit was brought? Second, Was the defendant a nonresident at the time of suing out the attachment?

The court found that the defendant was not indebted to the plaintiff in any sum, and this finding was made upon conflicting evidence. There was testimony to the effect that he had made the promise alleged, but the defendant, who testified in his own behalf, positively denied it. Under the well-settled rule, we are concluded by the finding of the trial court. The making of this promise being in issue, and the finding being in favor of the defendant upon that point, it is not necessary to consider whether the statute of frauds applied or not.

The attachment was based upon the alleged non-residence of defendant. He had been a resident of Pueblo for a number of years, but it was claimed that shortly prior to the suing out of the attachment, he had changed his residence to New Mexico. The question of change of residence is largely dependent upon intention, and where the intention is not openly expressed, it must be gathered from the facts proved. In this case the large preponderance of the evidence was unquestionably in favor of the finding of the county court, that at the time of the issuance of the attachment, the defendant was still a *bona fide* resident of Pueblo. It was shown by the testimony of defendant and his wife that he had simply temporarily left Pueblo and gone to New Mexico for the purpose of taking a three months' job of work which had been offered him, leaving his household goods in Pueblo. There was nothing shown to the contrary upon which to base more than a bare suspicion. We think the finding of the court was correct.

The judgment will be affirmed.

Affirmed.

[No. 2187.]

WILLIS V. ROBERTS.

1. Sales—Personal Property—Possession—Statute of Frauds.

To sustain a sale of personal property as against the creditors of the vendor the possession taken and retained by the vendee must be actual, open, notorious, unequivocal and exclusive. There must be no apparent possession left in the vendor. And it is immaterial whether or not the sale was *bona fide* or whether or not creditors had knowledge of it, unless it was followed by the required change of possession.

2. Same—Evidence.

Evidence examined and held not sufficient to constitute such change of possession as will sustain a sale of personal property as against creditors of the vendor.

Appeal from the County Court of Lake County.

Messrs. PHELPS & PENDERY and Mr. W. H. HARRISON, for appellant.

Mr. L. R. THOMAS and Mr. F. E. PURPLE, for appellee.

THOMSON, J.

Aaron Roberts sued Chauncy Callaway before a justice of the peace of Lake county to recover the amount of an indebtedness due him from the defendant, and caused a writ of attachment to be issued in the suit and levied upon two sets of harness, one wagon, four mules, one buggy, one cow and one heifer, as the property of the defendant. Louie Willis, a daughter of the defendant, interposed a petition in intervention, claiming all the property levied upon as belonging to her. The decision of the justice was against the intervenor, and she appealed to the county court, whose judgment being likewise against her, she appealed to this court.

The intervenor testified that she was the owner of the property attached; that she obtained it from her father, the defendant, in August, 1897, at Manitou, for money she had loaned him a year before; that he brought the mules from Nebraska to Manitou, and showed them to her in his stable, and she accepted them for the money owing to her; that they were left in the stable, but she took charge of them and fed them for two or three weeks while he was away; that when the family left Manitou for Twin Lakes, she led the mules into the cars, while her father was loading the other things; that when the mules were taken from the cars, they were driven to Twin Lakes by herself, her father and her mother—part of the time by one, and part of the time by the other—and turned into a pasture belonging to a Mr. Harlan; that the plaintiff was then working for her father, and knew that she had purchased the mules,

and that her father had turned them over to her; that at Twin Lakes the plaintiff was employed by her father to build a cabin for the family to live in, and did so; that after the cabin was built, the plaintiff still remained, did chores, helped around the house, attended to the stock, and drove the team when there was anything for it to do; and that when the constable came to attach the property, she told him it was hers.

The plaintiff testified that he was employed by the defendant to build a cabin at Twin Lakes; that two of the mules came on the train, and two were driven up by the intervenor and her father and mother; that the stock was put in the Harlan pasture, which he had engaged; that the defendant, upon leaving Twin Lakes, put the horses and mules into his charge, and told him to hire the teams, and make what he could; that he paid the money he received to the defendant's wife; that he might have given the intervenor five dollars, but if so, it was for her mother.

Mrs. Callaway testified that the plaintiff paid the money sometimes to Mrs. Willis; and that when she, Mrs. Callaway, received the money, she immediately turned it over to Mrs. Willis.

The sale was possibly good as between the intervenor and her father; but the plaintiff was an attaching creditor of the vendor, and the question is whether it was good as to him. It is provided by our statute of frauds that every sale made by a vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual and continued change of possession, shall be conclusively presumed to be fraudulent and void as against the creditors of the vendor.—Mills' Ann. Stats., sec. 2027.

The possession taken by the vendee must be actual, open, notorious, unequivocal and exclusive. There must be no apparent possession left in the

vendor. Whether the transaction was *bona fide*, or whether creditors had knowledge of it, is wholly immaterial. Unless the required change takes place, the sale is void as to them.—*Bassinger v. Spangler*, 9 Colo. 175; *Allen v. Steiger*, 17 Colo. 552; *Lloyd v. Williams*, 6 Colo. App. 157.

There is in the case before us no evidence that the actual possession of any of the property in controversy was ever changed. As to what was done with the property outside of the mules, not a word was said. Respecting the mules, the intervenor testified that she took charge of them; but she also said that they were left in her father's stable, and that what she did, in relation to them, consisted in watering and feeding them for two or three weeks while her father was away. Not having been removed from her father's stable, they remained in his possession; and the fact that during his temporary absence she watered and fed them, is without significance. Her leading the mules to the cars, while her father loaded the other property, and her alternating with her father and mother in driving them, were, on their face, only acts of assistance to her father in taking them to their destination. The evidence is uncontradicted that after the mules arrived at Twin Lakes, they were placed by the defendant in charge of the plaintiff, who, in obedience to the defendant's instructions, let them out for hire. And it is immaterial to whom the plaintiff paid the money he received. As against the defendant's creditors, the possession of the mules which the plaintiff had, was the possession of the defendant.

We are unable to find in the evidence a semblance of compliance with the requirements of the statute, and the judgment must be affirmed.

Affirmed.

[No. 2148.]

FLOYD v. THE COLORADO FUEL AND IRON COMPANY.

18	153
18	478

1. Negligence—Master and Servant—Safe Appliances.

It is the duty of a master to exercise reasonable care in providing the servant proper machinery and appliances and in fit condition for use, for the performance of the work required of him, but where the master has provided upon the premises and within reach of his servant suitable appliances, he is not liable for injuries to the servant caused by his failure to use the appliances furnished.

2. Same—Fellow Servant—Assumption of Risk.

Plaintiff had charge of the cupolas of the converting department of defendant's iron works. D. had charge of the machinery of the same department. Each had men under him but neither was under or subject to the order of the other, both being subject to orders of the superintendent. The superintendent ordered plaintiff to take his men and replace a runner that had burned out with a new one, and was told by plaintiff that it could not safely be done without a block and fall, whereupon the superintendent said he would send D. with the block and fall, and directed plaintiff to assist him in replacing the runner. Shortly afterwards D. appeared without the block and fall and upon being asked by plaintiff where it was answered that it was down in the engine room but that he was in a hurry and had not time to get it, and directed plaintiff to proceed without it. In attempting to replace the runner without the block and fall plaintiff was injured. Held, that plaintiff took his own chances in following the directions of D. and voluntarily assumed the risk of injury incident to the attempt to replace the runner without the block and fall, and defendant was not liable for such injury.

Error to the District Court of Pueblo County.

Mr. CHAS. E. GAST and Mr. HENRY A. DUBBS, for plaintiff in error.

Mr. D. C. BEAMAN and Mr. JOHN M. WALDRON, for defendant in error.

THOMSON, J.

The plaintiff in error was plaintiff, and the defendant in error, defendant, below. The complaint

alleged that on the 6th day of June, 1893, the plaintiff was in the employ of the defendant in the converting department of the defendant's works, and had charge, with others, during his working hours, of the practical operation of melting the iron in the cupolas preparatory to its conversion into steel; that each of the cupolas was fitted with a device called a runner, which was used for the purpose of carrying off the slag or refuse material forming in the cupolas during the process of melting the iron; that during the night of June 5, 1893, while the plaintiff was not on duty, the runner used in connection with one of the cupolas burned out, and was so rendered useless; that when the plaintiff went upon duty on the morning of the 6th, he was ordered by the superintendent of the converting department immediately to replace the burned-out runner with a new one; that because of the great weight of the runner and of the difficulty in handling it, the work could not safely and properly be done without a block and tackle; that the plaintiff requested the superintendent to furnish him with a block and tackle for the purpose of the work; that the superintendent neglected so to do, but ordered the plaintiff, and three others working with him, to put the runner in place without the aid of a block and tackle; that the plaintiff was inexperienced in such work, and did not realize its hazard and danger; that while he was in the act of lowering the runner, it became overbalanced because of its weight, and fell, catching his feet, and inflicting severe and permanent injuries; and that the accident was due to no fault or carelessness on his part.

The answer denied that the superintendent ordered the plaintiff to replace the runner; denied that the runner could not be safely and properly handled without a block and tackle; denied that the defendant was guilty of any negligence in failing to provide the

plaintiff with apparatus to do the work; denied that the runner fell because of its great weight; denied that the plaintiff was inexperienced in such work, or did not realize its danger; and averred that the injuries of which the plaintiff complained were sustained solely in consequence of the plaintiff's own negligence or that of his fellow-servant.

The fact of the injury sustained by the plaintiff, and the manner in which it was received, were proved as alleged. The plaintiff testified that at the time of the accident, he was employed in the cupolas of the converting mill, and had three men under him. That he had been in the employ of the defendant in different capacities for a number of years; that on the morning of the accident he was ordered by Mr. Crow, the superintendent of the converting department, to take his men and replace a runner which had been burned out and rendered useless, with a new one; that he replied, "We can't handle that runner without a block and fall," and that Mr. Crow then said, "I will send Douglas up after a while, and I want you to take the men and help put that runner in; I will send him up with a block and fall;" that Douglas was the man who had charge of the machinery in the converting department; that a short time afterwards, Douglas appeared without the block and fall, and said to the plaintiff, "Get your men, and we will put in that runner while the mill is idle;" that plaintiff then asked him where the block and fall was; that Douglas replied, "I haven't got one; it is down in the engine-room, and we are in a hurry, and I haven't got time to get one. There is no danger in putting it in this way;" that thereupon the plaintiff and his men undertook to lift the runner and put it in place without the aid of a block and fall; that this runner weighed seven hundred pounds or over; that he had not had much previous experience in such work, al-

though he had, once before, using a block and fall, assisted in putting in a runner, weighing about four hundred pounds, at another cupola. The superintendent testified that he instructed Douglas to take his own men, and a block and fall, to the spot, and put in the runner.

It is contended for the plaintiff that it was the duty of the defendant to provide the men with a block and fall at the place where the work was to be done. Unquestionably, as a general rule, it is the duty of the master to exercise reasonable care in providing the servant with proper machinery and appliances for the performance of the work required of him, and in a fit condition for use; the master's failure to do so is not one of the hazards which the servant risks in entering the employment; and, as to such duty, the negligence of a servant, whether of high or low degree, to whom its performance is intrusted, is imputed to the master.—*Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642; *Railroad Co. v. Sipes*, 26 Colo. 17.

But in this case it appears that the defendant had provided upon the premises, for the purposes of such work as that in which the plaintiff received his injury, an appliance called a block and fall, or block and tackle, and that such appliance was the proper instrumentality to be employed in managing and adjusting the runner; and it does not appear but that this appliance was in fit condition for use. It was, evidently, a portable instrument, intended to be carried from place to place in the works, as occasion might require. Mr. Douglas was ordered by the superintendent to take the block and fall and use it in handling the runner, but he disobeyed the order. Now, when, for the purposes of the work required of his employees, the master has provided upon the premises, and within their reach,

suitable implements and appliances, in suitable condition, he has, in such regard, discharged his full duty toward them, and he is not responsible for their neglect to employ the instruments he has provided. Having those instruments at hand, they take their own chances upon the consequences of failing to use them.—*McAndrews v. Burns*, 39 N. J. L. 117; *McLaughlin v. Iron Works*, 60 N. J. L. 557; *Dunlap v. Manufacturing Co.*, 148 Mass. 51; *Clark v. Riter-Conley Co.*, 57 N. Y. Supp. 755; *Railway Co. v. Needham*, 63 Fed. 107.

The defendant had furnished the proper appliance for putting the runner in place; it was within reach, and could have been used; and that it was not used, was not the fault of the defendant.

But counsel say that the plaintiff was acting in obedience to an order given him by his superior, and accompanied by an assurance of safety; and that unless the danger connected with the work was obvious—and counsel contend it was not—the defendant must respond in damages for the injury. The rule to which reference is had is thus stated in *Railway Co. v. O'Brien*, 16 Colo. 219:

“A servant is generally excusable for obeying orders in and about his master’s business when such orders are given by one in authority over him as a representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would obey even under the penalty of being discharged from employment.”

We do not think the rule can be held applicable to the facts of this case. We think it quite clear from the evidence that Douglas was not the plaintiff’s superior, and had no authority to command him. Douglas had charge of the machinery of the converting department, and the plaintiff had charge of the cupolas pertaining to the same department; each had

men under him, but neither was under the other. Both seem to have been subject to the orders of the superintendent. Accordingly, we find that the superintendent ordered Douglas to replace the damaged runner, and ordered the plaintiff to assist him. The only order the plaintiff was bound to regard, was that given him by the superintendent. Now, the superintendent did not order him to undertake the work without a block and fall. The plaintiff evidently realized that such apparatus was necessary, for when the superintendent first spoke to him concerning the runner, he said it could not be handled without a block and fall. The superintendent then informed him that one would be provided—that he would send it with Douglas; and the plaintiff understood that a block and fall was to be used, for when Douglas came he asked him where it was. When, in the absence of that appliance, he undertook to handle the runner, he was not proceeding in obedience to the order of the superintendent; and in heeding the direction and assurance of Douglas, he voluntarily assumed the risk of injury. However excusable he might have been, if he had obeyed an order of the superintendent to proceed as he did, he took his own chances in following the direction of Douglas, who was merely his fellow-servant, with no authority over him.

There was no question for the jury to pass upon, and a verdict for the defendant was properly directed.

The judgment will be affirmed.

Affirmed.

[No. 2174.]

RICKEY V. BRADY.

Appellate Practice—Verdict—Evidence.

Where plaintiff and defendant were the only witnesses and plaintiff's testimony established his case but was flatly contradicted by defendant, a verdict for plaintiff will not be disturbed on appeal.

Appeal from the District Court of El Paso County.

MESSRS. GLIDDEN & MCCARTHY and Mr. T. F. MCCARTHY, for appellant.

Mr. JOHN K. VANATTA, for appellee.

WILSON, P. J.

Plaintiff Brady claimed that he was employed by the defendant to secure for him an option to, or contract of purchase of some mining property, upon the express promise and agreement that if successful, he was to be paid therefor a commission of \$1,000. This suit is brought to recover that sum. It is conceded, or at least not disputed, that plaintiff thereafter conducted the negotiations and rendered the services as alleged, and that largely if not wholly through his instrumentality, the contract of purchase was secured for defendant upon terms acceptable to him. The only controversy is as to the alleged contract between plaintiff and defendant. Defendant denied that he ever entered into such contract or that he ever promised to pay to plaintiff the sum of \$1,000, or any sum. This was substantially the sole dispute upon trial in the district court. It was the only and controlling issue presented to the jury, and it was an issue of fact. It would seem under these circumstances that under the well-established rule the verdict of the jury upon this controverted question would be conclusive upon this court. Defendant contends, however, that the rule should not apply, because the verdict was manifestly against the weight of the evidence, and that the evidence presented is not sufficient to support it.

An exception may be conceded to the rule when the verdict is so palpably against the weight of the testimony as to raise a presumption that it was rendered under the influence of passion or prejudice, but

we do not think this case comes within such an exception. It would be impracticable and would serve no useful purpose to insert within this opinion all of the evidence bearing upon this question of employment. We think it only necessary to say that we have carefully read every line of the testimony, not only that presented in the abstract, but all that embraced within the typewritten bill of exceptions, and we have no hesitancy in saying that in our opinion the testimony of the plaintiff himself clearly established the alleged contract of employment, and the promise to pay. He was flatly contradicted by the defendant, who testified in his own behalf. They two were the only witnesses upon this disputed question. Their testimony presented an irreconcilable conflict of evidence. It was therefore a case peculiarly and specially within the province of the jury. The statement of the plaintiff was evidently believed, and the verdict was accordingly in his favor. It would therefore be a palpable disregard of the well-recognized rule if this court declined to be bound by the finding of the jury upon this question of fact, and undertook upon review of the evidence upon which it was based, to substitute its own and a different finding. It would be presumptuous on our part to undertake to say, solely from the typewritten statement presented to us, that the jury erred, and that it should have believed the statement of the defendant.

The judgment will be affirmed.

Affirmed.

[No. 2171.]

HARRIS V. THE PEOPLE EX REL. SQUIRES.

Cities and Towns—Trustees—Mayor pro Tem.—Right to Vote.

A member of the board of trustees of an incorporated town while presiding over the sessions of the board as mayor pro tem. is entitled to vote upon all questions whether or not there is a tie, and the appointment of a town marshal by the board

of trustees was legal although it required the vote of the mayor *pro tem.* to constitute the necessary number to elect.

Appeal from the District Court of Fremont County.

Mr. FRANK P. WARNER and Messrs. CHAMPION & MESERVE, for appellant.

Messrs. McLAIN & WILKES and Mr. G. D. BRADLEY, for appellee.

GUNTER, J.

This was an action for usurpation of office; relator had judgment. Defendant appealed. The pertinent facts were: At a regular meeting of the board of trustees of the town of Florence, four trustees present, one presiding as mayor *pro tem.*, relator was elected marshal, receiving the votes of the four trustees. Appellant contends the election illegal in that the trustee sitting as mayor *pro tem.* was disqualified in such case from voting.

The material question here, and the one decisive below, is the right of the trustee when sitting as mayor *pro tem.* to vote in the absence of a tie.

The statute prescribes the number of votes requisite to elect.—Mills' Ann. Stats., vol. 2, sec. 4445. This necessary number relator received, provided the vote cast by the trustee sitting as mayor *pro tem.* was properly counted. This officer was a member of the board of trustees before his election as mayor *pro tem.*, and entitled to vote; by such election he did not lose his character or status as a member. This being true he retained his right to vote.—Am. and Eng. Ency. of Law, 1034; Beach on Public Corporations, vol. 1, § 292.

The same rule obtains in this body as in our state, or in the national house of representatives, with reference to the speaker. In the two bodies last mentioned, a member of the house is elected as the

speaker, he does not cease to be a member by such election; among his rights as a member is that of voting, he does not lose it by becoming speaker.—*In re Speakership*, 15 Colo. 520, 526, 25 Pac. 707; *Whitney v. Village of Hudson*, 69 Mich. 189, 198.

The mayor *pro tem.* in the case before us was a voting member of the body, entitled to vote on any question as a member thereof. This true, his vote was legally counted for relator.

The judgment below should be affirmed.

Affirmed.

[No. 2209.]

CHEW V. THE BOARD OF COUNTY COMMISSIONERS OF
FREMONT COUNTY.

**Irrigation—Water Divisions—Counties Liable for Compensation
of Superintendent.**

All counties which contain lands that are irrigated by water taken from any one or more of the streams mentioned in the act creating a water division are embraced within the division and are each liable for their respective shares of the compensation of the superintendent of irrigation for that division whether or not such lands are irrigated through ditches whose priorities have been established by judicial decree. But if a county has no land within it which is irrigated by water from such stream or streams it is not liable for any part of the superintendent's compensation although it may contain lands lying within the course or watershed of such stream or streams.

Error to the District Court of Fremont County.

MESSRS. ARRINGTON & McALINEY, for plaintiff in error.

Mr. JOS. H. MAUPIN, for defendant in error.

WILSON, P. J.

Plaintiff as superintendent of irrigation of water division number two, presented to the defendant an itemized account as required by law of the per diem compensation allowed him by statute and of expenses

incurred, and a bill for the one-twelfth part thereof which he claimed was due him from Fremont county. Instead of this amount, he was allowed only one-nineteenth of the bill, and he brought this suit to recover the balance. The reason for his contention that he should have been allowed one-twelfth of the entire bill is shown by the following excerpts from the complaint:

“2d. That the only counties in said water divisions having lands irrigated by ditches deriving their water supply from said streams appertaining to water division No. 2, and whose priorities have been established by judicial decree are and were during the period for which compensation is claimed as follows: Park, Lake, Chaffee, Custer, Las Animas, Huerfano, Pueblo, El Paso, Otero, Bent, Prowers and Fremont, but there were seven other counties, to wit: Elbert, Arapahoe, Baca, Kiowa, Cheyenne, Kit Carson and Lincoln lying in whole or in part within the water sheds of the said streams which contain no ditch or ditches whose priorities have been established by judicial decree deriving a water supply for irrigation purposes from any of said streams in division No. 2.

“3d. That said seven counties last mentioned contain no ditches whatever deriving a water supply for irrigation purposes from any of said streams in division No. 2.”

A demurrer was sustained to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Plaintiff appeals. The controversy turns mainly on the construction of the sections of the statute creating the water division. They are as follows:

“That for the better regulation of the distribution of water for irrigation among the several ditches, canals and reservoirs into which such water

may be lawfully taken in times of scarcity thereof, the water districts now or to be hereafter established by law shall be constituted into water divisions as follows:”—Mills’ Ann. Stats., sec. 2440; Gen Stats., sec. 1802.

“ * * * That all water districts now or hereafter to be formed, consisting of lands irrigated by water taken from the Arkansas river, the south fork of the Republican river, the Smoky Hill river and the Dry Cimarron river, and the streams draining into the said rivers, shall constitute water division number two and be named the Arkansas division.”—Mills’ Ann. Stats., sec. 2442; Laws 1889, p. 472, sec. 4.

It is the contention of defendant in error, and was the theory upon which the trial court sustained the demurrer to the complaint, that all the counties that lie within the course prescribed in the statute creating a division, or watersheds of the streams mentioned and their tributaries, are regarded as interested counties, and as being embraced within the water division, and hence liable for their share of the compensation of the irrigation superintendent, and this regardless of the fact as to whether or not there are lands within the boundaries of the counties irrigated from the streams mentioned in the statute creating it. In two very recent cases this court held that a county was not embraced within a water division unless it appeared that there were lands in such county irrigated from some of the streams mentioned in the statute creating the division; and that if there were no such lands, it could not be held liable for any portion of the compensation due to the superintendent of irrigation. It was not sufficient to impose such liability that the lands within a county should lie within the watershed of any one or more of the streams mentioned in the statute. The language of the act creating the water divisions is plain and needs

no construction so far as that question is involved.—*Chapman v. Board of Commissioners of Phillips County*, 17 Colo. App. 236, 68 Pac. 134; *Ballard v. Board of Commissioners of Phillips County*, ante, 68. We see no reason to qualify or change the views or conclusions there expressed.

Plaintiff in error makes a plausible argument in support of the contention that only those counties are embraced within the water division and liable under the statute to defray a portion of the expenses and compensation of the superintendent, that have lands irrigated by ditches deriving their water supply from the streams mentioned in the act creating the division, whose priorities have been established by judicial decree. We cannot assent to this proposition. It is true that the statute in prescribing the duties of the superintendent says that he shall under the general supervision of the state engineer execute the laws of the state relative to the distribution of water, in accordance with the rights and priorities of appropriation as established by judicial decree.—Mills' Ann. Stats., sec. 2448; Laws 1887, p. 296, sec. 2. But this is not all of his duty. The same section provides that he shall perform such other functions as may be assigned to him by the state engineer, and this officer is expressly invested with a general supervisory control over the public waters of the state, and is required either in person or by those under his authority to do many things in connection with the streams, ditches, reservoirs, etc.—Mills' Ann. Stats., sec. 2459; Laws 1889, p. 372, sec. 2. Again, the same section—section 2448—gives the superintendent general control over the water commissioners of the several districts within his division. The duties of these commissioners are manifold, and are nowhere restricted to ditches or canals whose priorities have been established by judicial decree.—Mills' Ann.

Stats., secs. 2384, 2386; 3 Mills' Ann. Stats., sec. 2386a; Gen. Stats., sec. 1754; Laws 1889, p. 469, sec. 1.

According to the plain language of section 2442, if any county contains lands irrigated by water taken from any of the streams therein, it is embraced in the water division. If so included, it is necessarily interested because of that fact—some of the lands within its borders being irrigated by means of ditches taking water from the streams enumerated in the act establishing the division, and over which the superintendent, acting in person or through the water commissioners under him has a supervisory control, according to the express provision of the statutes which we have cited.

None of the views or the conclusion which we have expressed are at all in conflict with the case cited.—*County Commissioners v. Locke*, 2 Colo. App. 508. There an entirely different question was presented. None of those here involved were discussed or passed upon. There the question was as to whether Park county was liable for services rendered by the water commissioner outside of its limits, it being claimed by the county that the recovery must be limited to the sum which the proof showed was the value of what was done within its boundaries. Some liability was admitted, the only dispute being as to the amount. A liability being conceded under some conditions and to some extent, it must also have been conceded that Park county was within the water district or division, and that because there were lands within its boundaries irrigated through ditches taking water from the streams mentioned in the act creating it. If the county was not within the water district it could not have been liable at all under any circumstances. The controversy seems to have turned solely upon the insertion of the words *pro rata* in the

act of 1889 amending the statute previously in force providing for the payment of compensation to water commissioners. The sole dispute was as to the basis upon which the compensation must be computed with reference to the liabilities of the counties embraced within the district, and did not in any sense involve the question as to whether the county was or was not embraced in the district, which is the question here under the averments of the complaint.

Our conclusion is that all of the counties which contain lands that are irrigated by water taken from any one or more of the streams mentioned in the act creating the water division are embraced within the division, and are each liable for their respective shares of the compensation earned by the superintendent of irrigation for that division.

By the insertion of the third clause in the complaint a cause of action was stated. The judgment will be reversed and the cause remanded, with directions to overrule the demurrer. *Reversed.*

[No. 2197.]

CROTSEY ET AL. V. LAMONT.

Judgments—Assignment—Payment.

Plaintiff, a debtor, gave to N., a creditor, an order on a third party which was to be credited on his indebtedness to N. The order was accepted by the drawee and was assigned by N. to defendants who were also creditors of plaintiff, in consideration of which defendants agreed to assign their judgment against plaintiff to N. For some reason the judgment was not assigned and afterwards by attachment and garnishment defendant collected said judgment. Held, that the assignment of the order by N. to defendants and the agreement of defendants to assign their judgment against plaintiff to N. was not a payment and satisfaction of said judgment, but was a transaction between defendants and N. with which plaintiff had no concern and plaintiff could not maintain an action to recover back the money collected by defendant on the judgment by garnishment.

Appeal from the County Court of Mesa County.

Mr. R. M. LOGAN and Mr. MILLARD FAIRLAMB,
for appellants.

Mr. A. E. AMSBARY, for appellee.

WILSON, P. J.

Appellants, defendants in the suit, recovered a judgment against plaintiff Lamont for the sum of about \$250.00. George S. Conklin, agent for one George L. Nesbitt, who was also a creditor of Lamont, secured an order from Lamont on one Reed Burritt for \$225.00, which order was accepted by Burritt, and was to be credited as a part payment on Lamont's note held by Nesbitt. Negotiations between the defendants in this suit and Conklin resulted in an agreement that the sum collected on the order should be divided between Crotser & Company, and Conklin, representing Nesbitt, and in an assignment of this order to the defendants, Crotser & Company. There is some conflict in testimony as to the terms and conditions of this assignment, but as we cannot see that they affect the rights of plaintiff in this action, it is not necessary to discuss them, except to state that one condition was that defendants should assign their judgment against Lamont to Conklin, the agent of Nesbitt. The testimony does not show when this judgment was to be assigned, and about this there is some dispute. It never was, in fact, assigned. Several years after, defendants, under a writ of attachment sued out upon this judgment, garnisheed and recovered moneys belonging to the defendant in the judgment—Lamont—to the amount of about \$290.00. This money the plaintiff brings this suit to recover upon the ground that defendants wilfully, fraudulently and unlawfully, by means of the writ of garnishment and execution issued upon the above

money judgment, collected and compelled this plaintiff to pay said sum of money, notwithstanding the judgment had been long prior thereto fully paid and satisfied by the plaintiff. Judgment was in his favor and defendants appeal.

The theory of plaintiff seems to be that the agreement between the defendants and Conklin as to the assignment of the Burritt order by the latter to the former, and the assignment by the former to the latter of the judgment which they held against Lamont, was a satisfaction and payment of the judgment by Lamont, but we fail to see how his position can be sustained. Certainly that result did not follow from the facts stated as a legal proposition, and there is no evidence to show that such was the intention of the parties. It was entirely a deal as to matters with which this plaintiff had no concern. He had no interest whatever in the Burritt order, because it had been given by him as a payment on a debt owed to Nesbitt, and had been accepted by Nesbitt. No consideration passed from him, Lamont, therefore, for the agreement to assign, or for the assignment of the judgment. Indeed, it appears from the testimony that it was the intention of Conklin to hold and use this judgment when assigned to him so as to assist in the collection of the balance due by Lamont to Nesbitt, after the collection of the Burritt order. Mr. King, who acted as attorney for Conklin in negotiations between him and the defendants, testified with reference to the assignment of the judgment to be made to Conklin: "I understood that he intended to hold, and I advised him to hold the judgment for a time as a means of securing and collecting the balance due Nesbitt from Lamont." Mr. Anderson, attorney for Crotser & Company, also testified to this effect—to the fact that Mr. King stated to him during the negotiations, in the

presence of Conklin, that Conklin and he wanted the judgment against Lamont, as they might get something out of it in the future. But it is needless to pursue this further. There is no testimony whatever to show that Lamont ever at any time paid anything whatever in settlement or satisfaction of the judgment against him, or that this was at any time done by anyone else for him or in his behalf. It is indisputable from the evidence disclosed in the abstract that whatever consideration was paid or was agreed to be paid about or concerning the judgment, was for the assignment of it, and that this was paid solely by Nesbitt acting through his agent Conklin. Whatever the evidence may show as to any cause or causes of action which Nesbitt or Conklin might have had against the defendants in this suit, it is certain that it does not appear from the case as now presented that the plaintiff Lamont has any right to recover as he seeks to do in this action.

The judgment will be reversed, and the cause remanded for a new trial. *Reversed.*

No. 2195.]

COLLIN v. THE FARMERS' ALLIANCE MUTUAL FIRE INSURANCE COMPANY.

1. Bills and Notes—Pleading—Misnomer—Variance—Evidence.

Where a complaint on a promissory note set out a copy of the note in which the payor's name was spelled "Colin" whereas the name on the note was "Collin," the difference in the spelling was not a material variance and the note was properly admitted in evidence.

2. Pleading—Practice—Counterclaim—Dismissal.

Where a complaint alleged two causes of action and defendant set up a counterclaim which was general and applied equally to both causes of action and could have been disposed of at the trial of the first cause, it was not error to permit plaintiff to dismiss the second cause.

3. Evidence—Motion to Strike Out—Exception—Objection.

An exception to a ruling sustaining a motion to strike out

certain evidence is unavailing without previous objection to the motion.

4. Evidence—Withdrawal—Objections.

Where plaintiff introduced a witness and asked one question and when defendant commenced to cross-examine him, plaintiff by permission of the court withdrew the evidence to which defendant objected but stated no reason for the objection, the objection was insufficient to sustain an exception to the withdrawal.

Appeal from the County Court of Montrose County.

Mr. F. D. CATLIN, for appellant.

THOMSON, J.

The appellee was plaintiff, and the appellant defendant, below. Two causes of action were stated in the complaint. By the first a recovery was sought on a promissory note, dated January 18, 1897, and due ninety days after its date, with interest from date at ten per cent. per annum, which it was alleged the defendant had executed and delivered to the plaintiff. The second set forth an instrument to which the defendant's name was affixed, and which contained a promise to pay to The Alliance Mutual Fire Insurance Company \$105, in such portions and at such time or times, as the directors of the company might order for the payment of losses and expenses pursuant to its charter and by-laws; and alleged that the directors had ordered payment of the full amount named in the instrument for losses and expenses. The complaint also alleged that the Farmers' Alliance Mutual Fire Insurance Company and the Alliance Mutual Fire Insurance Company were one and the same company.

The answer denied all the allegations of the complaint; and, as to the first cause of action, admitted the execution and delivery to the plaintiff of the promissory note which it set forth, but alleged that the note was fraudulently procured upon the

pretense that the plaintiff was a solvent, reliable and *bona fide* insurance company, and would indemnify the defendant against loss by fire to the amount of \$3,500 for five years, which pretense was false. The second cause of action was met by substantially the same allegation. By a counterclaim filed with the answer, alleging damages sustained by him, the defendant asked a judgment for fifty dollars against the plaintiff. The replication was a denial. All the pleadings were verified.

On the plaintiff's motion the suit was dismissed as to the second cause of action. The trial resulted in a verdict in the plaintiff's favor for \$66.95. Judgment was entered accordingly, and the defendant appealed.

The defendant unsuccessfully objected to the introduction of the note in evidence on the ground that in the copy set forth in the complaint the defendant's name was spelled Colin, whereas his name as shown by the signature to the note was Collin. The defendant's name was Collin; it is evident that the pleader intended to set forth the same note which was offered; and the difference in the spelling would not constitute a material variance. There was no error in receiving the note in evidence.

Counsel says that defendant, having interposed a counterclaim, it was error to permit the dismissal of plaintiff's second cause of action. The counterclaim did not apply specially to the second cause of action. It was general, and could have been disposed of at the trial of the first. The withdrawal of the second impaired no right of the defendant to make his counterclaim good, and therefore did him no harm.

The abstract contains what purports to be a letter signed "Farmers' Alliance Mutual Fire Insurance Company, per R. A. Southworth, Sec.;" another, signed "D. M. Richards, President," and some

matter headed "Extracts from Policy." Following these we find a statement that on motion of counsel for the plaintiff, the court ordered them stricken out as being incompetent, irrelevant and immaterial. It is contended that this ruling was erroneous. There was no objection to the motion. There was an exception to the ruling, but the exception, without previous objection, amounted to nothing. However, except in the motion to strike the papers out, it nowhere appears that they were ever introduced in evidence at all. Neither are we able to find in the abstract any explanation of them, or any proof that the plaintiff was responsible for them. They appear in the abstract without introduction; on their face they do not seem to be relevant or material; but if they were, without more information concerning them than the abstract affords, we can not say that the court erred in striking them out, even if the motion had been met by proper objection.

The plaintiff introduced a witness and asked him one question; the defendant had commenced to cross-examine him when the plaintiff asked and obtained permission of the court to withdraw his testimony. Defendant objected to its withdrawal, assigning no reason for the objection, and now complains of the ruling against him. The objection was insufficient. It was the right of the court, as well as of the plaintiff, to be informed of the ground upon which it was based.

The abstract of the record which the defendant has furnished us is unsatisfactory. Plainly, it contains only detached and fragmentary portions of the evidence. It leaves us very much in the dark as to what was done at the trial. The presumptions are in favor of the judgment, and we nowhere find anything to break their force.

Let the judgment be affirmed.

Affirmed.

[No. 2186.]

CHEESMAN V. NICHOLL.

1. **Deeds—Consideration—Parol Agreement.**

The fact that a deed recites a certain sum as the whole consideration and acknowledges the receipt thereof will not prevent the grantor from recovering an additional consideration upon an oral agreement of the grantee even though such additional consideration was dependent upon the happening of a contingency, if it were such as not to defeat or impair the operation of the conveyance.

2. **Same—Receipts.**

Where at the time of the execution and delivery of a deed to real estate the grantee by parol agreed to pay the grantor a certain sum in addition to the consideration recited in the deed if the grantee should ever utilize the property for any purpose and the grantee did utilize the property for a reservoir, the grantor could maintain an action for the additional consideration. And the fact that at the time of delivering the deed the grantor executed a separate receipt in which he acknowledged payment in full of all that was due would not defeat his action for the additional amount that afterwards became due upon the utilization of the property by the grantee.

3. **Principal and Agent—Evidence.**

Agency may be established by evidence of facts and circumstances from which the existence of the agency may be conclusively presumed.

4. **Conveyances—Consideration—Parol Agreement—Instructions—Evidence.**

In an action by a grantor against a grantee to collect an additional consideration over and above that recited in the deed upon an oral promise of the grantee, an instruction which told the jury that the written instruments were presumed to contain all the agreements of the parties and that the burden was upon the plaintiff to establish the oral agreement by a preponderance of evidence and that the evidence must be so clear as to satisfy the jury that such agreement was made, was sufficient. It was not the duty of the court to require the jury to find the establishment of the parol agreement beyond a reasonable doubt.

Appeal from the District Court of Arapahoe County.

Messrs. ROGERS, SHAFROTH & GREGG, for appellant.

MR. WALTER M. KEENAN and Messrs. PATTERSON, RICHARDSON & HAWKINS, for appellee.

WILSON, P. J.

Appellee, who was plaintiff in the suit, and six others conveyed to the defendant their interest in certain unpatented placer mining claims. The consideration recited in the deed was \$2,200.00, but it is claimed that prior to and at the time of the execution and delivery of the deed, there was an oral agreement between the parties whereby the defendant should pay to the plaintiff and his co-owners the sum of \$1,300.00 additional, if the defendant ever utilized the property for any purpose. It is admitted that prior to the commencement of this suit, defendant had utilized the property in the construction of a large reservoir. Plaintiff seeks to recover by this action his proportion, one-seventh, of the additional payment which he claims was to have been made on the happening of such contingency.

It is conceded that under certain circumstances and for certain purposes the recital of the consideration in a deed may be explained and even contradicted by parol testimony. The rule is, as almost universally recognized and established, that the admissibility of parol evidence in such cases depends upon the object and purpose for which it is offered and used. If it is sought thereby to impeach the validity of the deed or to impair its operation as a conveyance, it cannot be received. If the effort is solely to affect the consideration expressed by explaining or contradicting it (where the recital does not contain matters of contract, nor language plainly showing that it was intended therein to conclusively state the full consideration) it is admissible.—*Brown v. The State*, 5 Colo. 506; *Fechheimer v. Trounstine*, 15 Colo. 388; *Jackson v. Railway Co.*, 54 Mo. App. 641;

Pickett v. Green et al., 120 Ind. 588; 3 Washburn, Real Property, pages 376-377; 2 Phillips on Evidence, page 548.

In Washburn, *supra*, it was said: "It is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed. * * * The true doctrine is stated in *Grout v. Townsend*, 2 Hill, 554, that where a deed acknowledges the receipt of a consideration, the grantor and all claiming under him are estopped from denying that one was paid. They may disprove the payment for the purpose of recovering the consideration money; but they cannot do so for the purpose of destroying the effect and operation of the deed. The design of the clause acknowledging payment of consideration is not to fix the precise amount paid, but to prevent a resulting trust in the grantee." In 2 Wharton, Evidence, section 1040, it is said: "Where the recital involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation."

In 2 Phillips, *supra*, it is said: "It is not any contradiction to the instrument to prove a larger consideration than that which is stated." The acknowledgment in a deed of the receipt of the whole consideration will not prevent the vendor from recovering the whole or any part of the unpaid price, and he may maintain his case by parol evidence.—*Wilkinson v. Scott*, 17 Mass. 249.

The grantor in a deed or written instrument may prove and recover upon an oral agreement to pay an additional consideration upon the happening of a certain contingency.—*Clark v. Deshon*, 12 Cush. 589; *Nickerson v. Saunders*, 36 Me. 413; *Thomas v. Barker*, 37 Ala. 392.

In the first cited case, the consideration named in the conveyance was \$4,500.00. The plaintiff was permitted to show that prior to its execution there was an oral agreement between the parties to the effect that upon the sale of the vessel which was the subject of the assignment or conveyance, at the end of six months, the defendant would pay to him the proceeds above \$4,500.00, and a commission of ten per cent., or would reconvey the brig upon payment of \$4,500.00 and such commission. The judgment was in favor of plaintiff. In the Maine case, the contingency was that in the event a road which passed through the land conveyed at the time of the conveyance should be altered or discontinued, and damages be allowed therefor, the plaintiff grantor should have the same as a part of the consideration of the sale. Irrespective of these authorities, if a vendor is entitled to prove and recover upon an oral agreement a consideration additional to that expressed in the deed, we cannot see why upon principle or reason he should not have the right to do the same thing, even though the additional consideration rest upon the happening of a contingency, it being such as not to defeat or impair the operation of the conveyance. In either case the underlying principle is the same, viz., the right by parol testimony to explain, vary or contradict the recital of the consideration expressed in the deed, the recital being merely in the nature of a receipt for some consideration so as to support the conveyance and prevent a resulting trust in the grantee. The Colorado authorities cited by counsel are not in conflict with these views, nor with this conclusion. In *Brown v. The State*, *supra*, a forfeiture was involved—one which defeated the entire conveyance. In *Drake v. Root*, 2 Colo. 685, and also in *Omaha S. & R. Co. v. Tabor*, 13 Colo. 50, it was sought to prove a contemporaneous parol agreement where-

by the grantor, despite the conveyance, was to retain possession of the premises in whole or in part, for a specified length of time. This would have impaired and defeated the operation of the deed, because by statute it was and is expressly provided that the execution and delivery of a deed shall carry with it the right to immediate possession by the grantee.—Gen. Stats., sec. 206; Mills' Ann. Stats., sec. 435.

It is a matter of common knowledge that the recitals of consideration in conveyances cannot be relied upon as true. Very generally, if not in the majority of instances, the recital is of a greater or less amount, where the consideration is money, than the true consideration. It would in many cases work great hardship, this being the practice, both to vendors and vendees, if the recital was in all cases conclusive. And if the grantee may be permitted in a suit for the purchase money to prove by parol testimony that the consideration was less than that expressed in the deed, why should not the grantor be allowed to show by the same character of evidence that it was greater?

It is contended, however, by defendant, that conceding the rule as announced to be the true one, it does not embrace this transaction, because all of the instruments in writing executed contemporaneously with the deed and referring to this sale, should be considered and treated in legal effect, as one, and when so considered, it conclusively appears that the deed was intended to and did recite the full consideration to be paid. These additional instruments were an affidavit by the grantors that they were the original locators of the placer mining claims; that they were citizens of the United States; that the assessment work had been done regularly upon each of the claims since their location, and that upon each of them a sufficient amount of work had been done to entitle

them to be patented. Also, an agreement that they would assist the defendant or his assigns in his application for patent, and would in such case make affidavit as to the five hundred dollars' worth of work done and necessary to secure patent, and would testify as to the annual assessment work; and also a statement of account showing the several amounts due to the several grantors in accordance with the consideration expressed in the deed, signed by the auditor and manager of The Mountain Water Works Construction Company, through whom the money was paid, and on the back of it a receipt for the several amounts, signed by the several grantors. Counsel earnestly urge that this latter statement constitutes what they call a "voucher," and that its recitals are not subject to impeachment by parol testimony, as would be those of a receipt. We do not feel it necessary to enter into any discussion as to what the instrument should be technically called, or what it constitutes. Let it be called whatever it may, there is nothing in its contents, any more than in the deed, showing that it recited the entire consideration for the conveyance. There is nothing in it which is inconsistent with the theory of plaintiff that an additional consideration was to be paid upon the happening of a certain contingency. It recited truly that the amount stated was "in full for balance due on placer claims, as per deed received this day." That this was all that was due upon the execution and delivery of the deed is not disputed. It does not, however, necessarily exclude, and is not inconsistent with the idea that a further sum might thereafter upon the happening of a contingency, become due. A party is not estopped to explain by parol testimony a receipt, even where the recital is in full of all claims. —*Bettman v. Shadle*, 22 Ind. App. 543; *Allen v. Tacoma Mill Co.*, 18 Wash. 218. We see no greater rea-

son why the plaintiff should be estopped in this case to explain the recital in this so-called voucher, if, indeed, any explanation was needed.

It is claimed, however, that the parol testimony offered was inadmissible, because the contingency on the happening of which plaintiff alleged that he was entitled to an additional payment, was one which tended to defeat the operation and effect of the conveyance. It is urged that by the execution and delivery of the deed the defendant became entitled to the immediate possession of the property, and had the consequent right to subject it to any use he saw fit. Admitting this to be true, we cannot see how it can avail the defendant. The plaintiff has not sought, nor does he seek, to deprive him of the use or possession of the property, but simply claims that he was to be paid an additional sum if in the future the defendant found that he could utilize and did utilize the property.

It is insisted that under the evidence if there was any agreement at all with reference to the payment of a consideration additional to that expressed in the deed, it must have been entered into by the defendant through an agent, his attorney, who, acting for him, prepared the deed and other accompanying papers, and that there is no proof whatever of the existence of this agency. It is elementary that an agency may be established not only by proof of an express authorization or appointment, but also by evidence of facts and circumstances from which the existence of the agency may be conclusively presumed. In this case plaintiff was unable to show express authority from the defendant to his attorney to act as his agent in the matter in question, and was forced to rely upon facts and circumstances to establish it. Some of these were disputed; others were not denied. There was a direct and positive conflict between the testi-

mony of Mr. Barnes and Mr. Nicholl on the one part, and the defendant on the other, as to certain facts having a material bearing, with others, upon the question. These were concerning conversations between these parties and the defendant subsequent to the execution of the deed. These conversations were not applicable, as claimed, alone where ratification was in issue, but were clearly admissible to show in connection with other facts an express appointment of the agent, or facts from which such appointment should be presumed. Being thus presented therefore, the question of the existence of the agency was not one of law, but one of fact to be submitted to the jury. It having been so submitted upon conflicting evidence and under proper instructions, this court is under the well-settled rule concluded by the verdict. It was not so manifestly against the weight of the evidence, if at all, as to justify the interference of the appellate court. *Lester v. Snyder*, 12 Colo. App. 352, is not in point, and does not tend to support the position of defendant. There the sole question was whether an agency could be presumed from certain admitted and undisputed facts. This was manifestly purely a question of law. There was no dispute as to any facts for a jury to pass upon. As we have stated, a different case is presented here.

Certain assignments of error are predicated upon some of the instructions to the jury. Instruction number two was in substance to the effect that if the jury found from a preponderance of the evidence that the agreement in question for the payment of an additional consideration had been entered into as alleged by plaintiff, and that the contingency upon which it was to become due had happened, then the verdict should be for the plaintiff. Instruction number three was with reference to the agency and the character and quantum of proof by which it must be

shown. Number four was recitative, and was to the effect that in this action the substantial part of the plaintiff's complaint was that at the time of the execution of the deed and certain other instruments relative to the conveyance by plaintiff and others to the defendant of certain placer mining claims, it was agreed that an additional consideration should be paid, etc., as alleged by plaintiff, and that the making of such agreement was denied by defendant. Number five was to the effect that the several written instruments executed and delivered at the time of the sale were presumed to contain all the agreements of the parties, and that to add the additional agreement claimed, it was necessary that the testimony should be so clear as to satisfy the jury that the agreement was made as claimed by the plaintiff. To this instruction defendant requested the addition of the words, "beyond a reasonable doubt," which request was denied. None of the instructions are inconsistent or conflicting. Number two was not erroneous, because it did not state the entire transaction, and made no reference to the deed and other instruments. When taken as a whole, the instructions fairly presented to the jury the entire transaction. In such case, there being nothing to indicate in the slightest degree that the jury might have been misled, it is sufficient, and the objections to the charge cannot be sustained. — *Mining Co. v. National Bank*, 2 Colo. 565; *Hindry v. McPhee*, 11 Colo. App. 398; *Simonton v. Rohm*, 14 Colo. 51.

We know of no rule or authority why it should be reversible error, if error at all, for the court to have refused the addition to the fifth instruction of the words, "Beyond a reasonable doubt." The jury were instructed that the burden of proof was upon the plaintiff, and that before they would be authorized to find for him they must find that he had proved

the material facts in question by a preponderance of the evidence, and that this must be so clear as to satisfy them that the agreement in question had been made as claimed by plaintiff. We think this entirely sufficient. The authorities concur that the recital of the consideration in a deed is only *prima facie* proof against the party making it, liable to be explained, varied, or contradicted by parol evidence, and that it stands upon the same basis in this respect as an ordinary receipt for money. If this be true, we know of no reason for requiring a greater quantum of proof in the one case than in the other. It concerns only the payment of a money consideration, and neither affects nor impairs the validity of the conveyance of realty.

The facts were passed upon by the jury, and found in favor of the plaintiff. Being unable to discover any errors of law, the judgment must be affirmed.

Affirmed.

[No. 2177.]

MURPHY AS RECEIVER OF THE NEEDLES NATIONAL BANK
V. GUMAER.

1. Bills and Notes—Accommodation Paper—National Banks—
Receivers—Estoppel.

Where a national bank had in violation of the national banking act loaned to one person more than one-tenth of its paid-in capital stock and a person executed his notes, one payable directly to the bank and others to payees who indorsed them and delivered them to the bank, which were credited upon the unauthorized loan thus reducing the loan to an amount within the statute, the maker is liable on such notes in the hands of a receiver of the bank, notwithstanding they were executed purely as a matter of accommodation to the borrower and notwithstanding said borrower may have owned nearly all the capital stock of said bank and had complete control thereof. Even though the bank knew the notes were accommodation paper and accepted them under conditions that would have precluded its recovery thereon, the notes having been executed for the pur-

pose of giving the bank the appearance of holding genuine and valid assets, the maker is estopped to say as against the creditors of the bank that they were other than what they appeared on their face to be.

Appeal from the District Court of Arapahoe County.

Messrs. CRANSTON, PITKIN & MOORE, for appellant.

Messrs. PATTERSON, RICHARDSON & HAWKINS, for appellee.

THOMSON, J.

In the latter part of 1892 or early part of 1893, The Needles National Bank of Needles, California, was organized pursuant to the National Banking Act, with a capitalization of \$50,000, and was opened for business in March, 1893. On the 15th day of May, 1893, A. R. Gumaer made his two negotiable promissory notes for \$2,500, due sixty days after date, and payable, one to the order of The Gladiator Mining Company, and the other to the order of The Needles National Bank; and on the 20th day of the same month he made his three additional negotiable promissory notes for \$2,500 each, due sixty days after date, and payable respectively to The Nevada Southern Railway Company, The Needles Reduction Company, and Isaac E. Blake. The note to the bank was delivered to it and, before their maturity, the others were endorsed by the payees and delivered to it. When these notes matured, they were replaced by new notes given by Gumaer, for the same amount to the same payees, all payable on demand—those to The Gladiator Mining Company and The Needles Reduction Company on the 15th day of July, 1893, and those to The Needles National Bank, Isaac E. Blake and The Nevada Southern Railway Company, on the 20th day of July, 1893. All of these notes were immediately delivered to the bank and, except the one pay-

able to it, were endorsed by the respective payees. The original notes were surrendered to the maker. In December, 1894, the bank suspended payment, and Daniel Murphy, having been appointed its receiver by the comptroller of the currency, duly qualified as such, and entered upon the discharge of the duties of his office. On the 18th day of November, 1895, this action was brought by the receiver against Gumaer to recover the amount due on the notes.

The defense was that each of the notes was accommodation paper, given without consideration, and that neither the bank nor the plaintiff nor any one else ever acquired title to the notes or any of them as a *bona fide* holder for value. The verdict and judgment were for the defendant, and the plaintiff appealed.

The evidence disclosed the following facts: The stockholders of The Nevada Southern Railway Company, The Gladiator Mining Company, The Needles Reduction Company, and The Needles National Bank were nearly identical, and a majority of the stock in all of them was owned by Isaac E. Blake, who was also a director of the bank; the bank loaned to each of the corporations \$5,000, which amount equaled one-tenth of its paid-up capital; the managers of the companies and also Mr. Blake made large overdrafts on their accounts, the exact amounts of which do not appear; the loans were not paid, and the officers of the bank wrote to Blake asking him to put some other paper in their possession, so that they would not appear to have extended credits beyond the limits of the National Banking Act. Mr. Blake then requested the execution by the defendant of the notes in question, acquainting him fully with the situation, and informing him that the companies had made overdrafts on the bank, and secured discounts beyond the limits fixed by the National Banking Act, and that these

notes were wanted for the purpose of reducing the overdrafts; also saying to him that he, Blake, was the bank, that he owned ninety-five per cent. of the stock, that everything was run by himself, or as he might dictate; that the notes would be an accommodation to the bank and, therefore, to him, as the principal stockholder; that he, the defendant, would not be expected to pay them, and that when the bank did not require the notes longer for the purpose of representing the overdrafts, they would be returned. Upon the foregoing statements the defendant signed the notes as requested. After the bank accepted the notes it treated them as all its loan and discount paper was treated. They were entered the same as if cash had been paid; the overdrafts were extinguished to the extent of the face of the notes, and the notes were included in the reports to the comptroller of the currency, and laid before the national bank examiner when he investigated the condition of the bank. Some payments of interest were endorsed on the notes; the testimony was, however, that no money was paid, but that the cashier simply charged the amounts so endorsed to the accounts of the payees of the notes.

This case is here for the second time. Upon the former hearing this court reversed a judgment rendered by the trial court in favor of the defendant, on the ground of insufficiency of competent evidence to sustain it.—*Murphy v. Gumaer*, 12 Colo. App. 472.

At the second trial considerable new evidence was introduced, and evidence formerly held incompetent by this court, omitted. Very much of that now before us is the subject of attack by the plaintiff, but we do not deem it necessary to pass upon his objections. We have detailed none of this portion of the evidence, for in our view, it is immaterial; and, outside of it, upon principles to which it has no relation, the judgment should not be suffered to stand.

The position taken for the defendant is that Blake was the agent of the bank; that what he did in the way of procuring the notes was, in effect, done by the bank itself; and that the bank was, therefore, not an innocent purchaser for value, but was merely the temporary holder of notes given without consideration, under an agreement by which it was bound, that their collection would never be enforced. This theory is, in a considerable degree, deduced from the evidence to which we have just alluded, and which we have not otherwise noticed. But we may concede without restriction or qualification the existence of all the conditions which counsel find in the evidence, and still a judgment for the defendant does not result. Whatever relations Mr. Blake may have sustained to the bank, how completely soever it may have been subject to his control and bound by his acts, the concern was a national banking corporation, the management of which was regulated by the act of congress in pursuance of which it was organized. That act is Title 52 of the General Statutes of the United States. It provides that the total liabilities to the bank of any person, firm or corporation, for money borrowed, shall at no time exceed one-tenth of its capital stock actually paid in, but that the discount of commercial or business paper owned by the person negotiating the same shall not be considered as money loaned; it imposes upon the bank the duty of making and transmitting to the comptroller of the currency five reports during each year, verified by the oath or affirmation of its president or cashier, and attested by the signatures of at least three of its directors, each of such reports to exhibit the resources and liabilities of the bank on any past day by him specified, and exacts the publication of each report, as made to the comptroller, in some newspaper in the place where the bank is located, or if none be there, then in the

newspaper that is nearest; it provides for the appointment by the comptroller of a suitable person or persons to inspect the business of each bank, with power to make a thorough examination into all its affairs, and requires him to make to the comptroller a full and detailed report of its condition; and it provides that if the directors of any national banking association shall violate, or knowingly permit any of its officers, agents or servants, to violate, any of the provisions of the act, all of its rights and privileges shall be forfeited, the violation to be determined and adjudged in the proper court at the suit of the comptroller.

At the time the notes, of which those before us were renewals, were made, endorsed and delivered to the bank, the provision forbidding a loan to one person or corporation of an amount greater than one-tenth of the capital stock, had been violated. The next report to the comptroller by the bank, or the bank examiner, of its condition, would infallibly show that it had become liable to a forfeiture of its rights and privileges; and these notes were obtained and delivered to the bank for the express purpose of making it appear that the requirements of the provision had been observed. Accordingly, the overdrafts were extinguished to the extent of the face of the notes, and the notes were entered on the books as discount paper. To all appearances they were commercial paper, owned by the person negotiating them, and, therefore, not subject to the inhibition as to the amount which might be loaned to one person. To the bank examiner, when he should make his examination, to the comptroller, when he should receive the reports of the bank and of the examiner, and to the public when the bank's reports should be published, these notes would appear as *bona fide* assets of the bank.

Now, the defendant knew the exact purpose for which the notes were taken. He was advised that the payees of the notes had—to use his own language—“obtained overdrafts and had obtained a line of discount which was in excess of what the bank was able to loan them, and keep within the requirements of the banking law;” according to his testimony, he was also advised that his notes were wanted for the purpose of reducing the overdrafts; and, according to Mr. Blake, when he was requested to sign the notes, he received full information of the situation. The notes were used to give the bank an appearance of soundness, to prevent a suspicion to the contrary on the part of the bank examiner and the comptroller, and, through the published reports of the bank to the comptroller, to acquire the confidence of the public. It is true that no consideration moved to the defendant; but the overdrafts were extinguished on the books of the bank to the extent of the face of the notes, and the release of the bank’s claim on account of the overdrafts was a sufficient consideration for the plaintiff’s promise.

But it is said that there was no intention to release any claim of the bank on account of the overdrafts; that the entries by which they were apparently paid were made merely to give a better appearance to the bank’s statements, but that when the overdrafts were paid, as they were expected to be, the notes were to be returned to the defendant. In other words, the contention is that the apparent release of the debts evidenced by the overdrafts, was fictitious; that while they appeared to be released, they were not in fact released; and that, therefore, the supposed release did not constitute a consideration for the notes. Conceding that the facts were as counsel states them, we are unable to see wherein they are of any avail to the defendant. We do not think he is in a position

to say that the books did not speak the truth. This controversy is not between the bank and the defendant. The suit was brought by the receiver, and he is a representative of the creditors of the bank; its assets constitute a trust fund in his hands for their benefit.—See *Riddle v. National Bank*, 27 Fed. 503; *Case v. Terrill*, 11 Wall. 199.

In accordance with the provisions of the National Banking Act, it is his duty to cause debts due to the bank to be collected, and its property to be sold, and, if necessary for the payment of the debts due from it, to enforce the individual liability of the shareholders. He pays over the money he receives to the treasurer of the United States, subject to the order of the comptroller; and the latter, after full provision has been made for refunding any deficiency in redeeming the notes of the bank, makes, from time to time, ratable dividends on the claims of creditors which have been proven; and what is left, if anything, is paid over to the shareholders.

That the bank had creditors, that it received deposits and did a general banking business, the evidence abundantly shows. [The defendant was instrumental in clothing the bank with such an appearance of genuine assets as induced the comptroller to regard it as sound, and to suffer it to continue in business. In the reports which were transmitted to him, these notes figured as resources; and the public had a right to rely on the reports when they were published. If the defendant was not liable on the notes, the comptroller was deceived, and the persons who dealt with the bank and intrusted it with their money, were also deceived. However valid the defense might be if the bank were plaintiff, the defendant, who, when he gave the notes, knew exactly the purpose for which they were to be used, is estopped to say, as against the creditors, that they were other than what, on

their faces, they purported to be, or that the appearance which was given to the books was not genuine.]

The plaintiff requested an instruction that under the law and evidence the jury should return a verdict in favor of the plaintiff for the amount due on the notes, and, this request being refused, asked an instruction that if the jury found from the evidence that the notes were given with the intention of having them appear on the books of the bank, and be included in the published statements of the bank, as valid assets, and that the notes were so used, the defendant was estopped to say that the notes were not valid, and were not intended to be paid, which was also refused. The latter request, in our opinion, correctly stated the law applicable to the case, but the proposed instruction was faulty in submitting to the jury a question upon which there was no conflict in the evidence. The only question which the case presented was one of law, and the instruction to find for the plaintiff the amount due upon the notes should have been given.

The judgment will be reversed with instruction to the trial court to enter judgment in the plaintiff's favor for the face of the notes with accrued interest, less any credits to which they may appear to be entitled.

Reversed.

[No. 2104.]

SMILEY V. BRADLEY ET AL.

1. Principal and Agent—Commission—Sale of Real Estate—Evidence.

In an action by real estate agents for commission where the cause of action was based upon the ground that plaintiffs procured a customer and that through their efforts a sale was effected, evidence that prior to the date of giving the agency to plaintiffs by defendant other agents had introduced to defendant the party who subsequently became the purchaser through them, and that the negotiations with said purchaser through said other agents had never been broken off, was admissible in

defense to show that the sale was not effected through plaintiffs' efforts, and its exclusion was error.

2. Same—Instructions.

In an action by real estate agents for commission under a specific contract of agency in writing, where plaintiffs based their cause of action on the ground that a sale had been effected through their efforts, and where there was evidence tending to show that negotiations were pending between defendant and the purchaser through other agents prior to the time defendant gave to plaintiffs the agency, and that said negotiations subsequently resulted in a sale, it was error to instruct the jury not to consider any proposition of sale or trade between any parties and defendant prior to the agency contract between defendant and plaintiffs.

Appeal from the District Court of Arapahoe County.

Messrs. BENEDICT & PHELPS and Mr. HORACE C. PHELPS, for appellant.

Messrs. MCGINTIE & ANDREWS, for appellees.

GUNTER, J.

This was an action to recover commission on sale of real estate. Plaintiffs had verdict and judgment. Defendant appealed. The complaint contained two counts. By order of the lower court trial was had upon but one. To this ruling no cross-error was assigned. The count upon which the trial was had, alleged the making of a specific contract in writing whereby defendant agreed to pay plaintiffs a commission provided a sale was effected through the efforts of plaintiffs, at a price satisfactory to defendant. It further alleged that through the efforts of plaintiffs a sale was effected at a price satisfactory to defendant, and prayed judgment for the stipulated commission. That the sale was effected through the efforts of plaintiffs was denied in the answer. It is thus seen that the cause of action alleged was that plaintiffs had by securing the purchaser through their efforts complied with the contract. The cause of action was not that plaintiffs would have secured a

purchaser but for the interference of defendants, it was not that defendant had wrongfully revoked the agency after the performance of substantial services thereunder by plaintiffs, but it was that plaintiffs had carried out the contract by procuring a purchaser of the property involved.

It was incumbent upon plaintiffs in making out their case to satisfy the jury that the sale counted on had been effected through their efforts, and they introduced evidence tending to establish this issue. The contract upon which plaintiffs counted was dated November 12, 1897, and it was alleged that the sale brought about through their efforts was made March 14, 1898. To overcome the evidence of plaintiffs, adduced for the purpose of showing that the sale in question was effected through their efforts, the defendant offered to show that for months prior to the date of the giving of the agency to plaintiffs by defendant the party who subsequently became purchaser through agents Joralman, Harrison and Jarmuth had been negotiating with defendant for the property in question, that through such agents the purchaser had been first introduced to the defendant. Further, that these negotiations were never broken off, and continued up to the date of the sale; that various propositions from the purchaser had from time to time been submitted to the defendant including one of the proposition presented by plaintiffs, and that such submission was prior to its presentation by plaintiffs.

This evidence the defendant offered through the agent Jarmuth; the court refused to receive it.

As it appears from the evidence that the proposition upon which the sale was actually closed was better than any proposition that had been conveyed by plaintiffs to defendant, and that it was presented to defendant by the agent Harrison, it can be appreci-

ated that the evidence refused might have been of service in determining the question as to through whose efforts the sale was brought about. The court erred in rejecting this evidence, and we cannot say that defendant was not prejudiced thereby. Evidence tending to show some of the same facts was offered by defendant through the witness Harrison. This also the court refuse to receive.

Some of the above rejected evidence was supplied in a disconnected manner along through the testimony, but not all of it, and that which did so come in lost much of its force in the disconnected, irregular manner in which it appeared. The error in the rejection of the above testimony was magnified by the giving of instruction No. 10, wherein the jury was charged that it should not take into consideration any transaction or proposition of trade or sale between any parties and the defendant prior to the agency contract above mentioned with defendant, and that it should confine its inquiries to the transactions since the date of the agency contract. In determining the material issue through whose efforts this sale was brought about, we think the jury was entitled to any evidence showing the influence of the agents Jorallman, Harrison and Jarmuth, or any one of them, exerted upon this sale before or after November 12, 1897.

No opinion is expressed upon the other questions urged.

Judgment reversed.

Reversed.

[No. 2160.]

GERAGHTY V. RANDALL.

1. Appellate Practice—New Trial—Waiver.

Under particular circumstances an order granting a new trial may be the subject of review, but to give the complaining party any standing in the appellate court he must abandon his

case at that point. By participating in the new trial he acquiesces in the order granting it, and waives any right he may have had to question the correctness of the ruling.

2. Sales—Fraudulent Representations—Evidence—Admissions.

In an action by a purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and was purchased through the false and fraudulent representations of defendant, defendant's admissions were competent evidence against him.

3. Sales—Fraudulent Representations—Principal and Agent—Reliance of Agent.

In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and that the sale was made through defendant's false and fraudulent representations, where plaintiff had no personal knowledge of the transaction but made the purchase entirely through an agent, it was sufficient to show the agent's reliance upon the representations and was not necessary to show plaintiff's reliance thereon.

4. Sales—Fraud—Juries—Verdict—Special Finding.

In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the sale was effected through the false and fraudulent representations of defendant the jury returned a general verdict for plaintiff, and in answer to a special interrogatory found that defendant was guilty of fraud and wilful deceit. The court sustained the general verdict but set aside the special finding on the ground that it was not sustained by the evidence. Held, that the action of the court was not inconsistent and that its action in setting aside the special finding will not be construed as a ruling that there was no evidence of fraud upon which to base the general verdict, but that there was not sufficient evidence of fraud and wilful deceit to warrant a verdict the effect of which was to authorize execution against the body of defendant.

5. Appellate Practice—Subsequent Evidence.

A petition to reverse a case upon facts which occurred after the trial in the lower court will not be heard in a court of review.

Appeal from the District Court of Arapahoe County.

Messrs. FILLIUS & DAVIS, for appellant.

Mr. T. B. STUART and Mr. CHAS. A. MURRAY, for appellee.

THOMSON, J.

This action was brought by the appellee against the appellant. The complaint alleged that on the 30th day of January, 1897, the defendant sold to the plaintiff fifty thousand shares of the capital stock of the Cape May Mining and Leasing Company for six hundred dollars; that while negotiating the sale to the plaintiff, the defendant represented to him that the company was the owner of valuable mining property in the Cripple Creek mining district, in Colorado; that the company had applied for a United States patent to the property; that he, the defendant, was familiar with the claim of the company to the property, the application for patent, and the proceedings thereunder; that there was nothing whatever, either by way of protest, adverse, prior claim or hostile possession, to prevent or delay the granting of the application; and that there were no conflicting claims of any kind against or in the way of a prompt and speedy issuance of the patent to the company for the property. The complaint further averred that the plaintiff, being without means of knowledge as to the truth or falsity of the representations, relied absolutely upon them, and, so relying, paid to the defendant six hundred dollars in cash for the stock; that the representations were fraudulent and false; that at the time the defendant procured the money from the plaintiff, the company's application for patent had been met by an application of certain other parties for a patent to the same ground as a placer claim, which fact the defendant fraudulently concealed from the plaintiff; that the plaintiff would not have made the purchase, or paid the money, had he known that the company's application was contested; that the

stock was absolutely worthless; that the plaintiff, as soon as he discovered the facts, tendered to the defendant the stock purchased by him, offering to make the proper transfer, and demanded the refunding to him of the money he had paid, but the defendant refused to receive the stock or refund the money. The answer was a general denial.

At the trial the following special interrogatory was submitted to the jury: "Was the defendant in obtaining the money of plaintiff as stated in the complaint, guilty of fraud and wilful deceit?" The jury returned a general verdict for the plaintiff, assessing his damages at six hundred and eighty-six dollars, and answered the special interrogatory in the negative. On motion of the defendant judgment was entered in his favor notwithstanding the verdict. This judgment was afterwards vacated at the plaintiff's instance, and a new trial had. At the second trial, in which both parties participated, the jury were required to answer the same special interrogatory which was first propounded. They returned a general verdict for the plaintiff, assessing his damages at six hundred dollars, and answered the special interrogatory in the affirmative. The defendant moved the court for a new trial on the ground, among others, that the evidence was insufficient to sustain the verdict. As to the general verdict the motion was denied; but it was allowed as to the special finding, on the ground that the latter was not sustained by the evidence. Judgment was entered on the general verdict, and the defendant appealed to this court.

The ruling of the court in vacating the first judgment and granting a new trial, is assigned for error. That under particular circumstances an order granting a new trial may be the subject of review, is settled in this state.—*Wadsworth v. Railroad Co.*, 18 Colo. 600.

But to give the complaining party any standing in the appellate court, he must abandon the case at that point. By participating in the new trial, he acquiesces in the order granting it, and waives any right he may have had to question the correctness of the ruling. The defendant was present at the second trial, examined and cross-examined witnesses, and made a vigorous defense, and it is therefore too late now to say that the order granting the new trial was erroneous.

Objection for the defendant was taken to the following question put by the plaintiff to Frona R. Houghan: "Now state what was said in Mr. Geraghty's presence, or what he said concerning this matter that you have testified about." The objection was disallowed. The witness was the agent of the plaintiff in the purchase of the stock, the latter living in another state, and having no personal connection with the transaction. She had testified to the fact of the purchase, to the representations on which it was made, and immediately before the question was asked, had stated that after the real condition of the title to the property came to her knowledge, she had a conversation with the defendant on the subject. The question related to the last conversation, and we are unable to see wherein it was improper. His admissions, if he made any, were competent evidence against him; and on the face of the question its purpose was merely to show what his statements were. No fault was found with the answer. Equally proper was the question whether the witness relied upon the defendant's statements. The objection was that it was not her reliance, but the plaintiff's, that should be shown. But the plaintiff dealt through her. He was without personal knowledge of the situation, and a misrepresentation to his agent was a misrepresentation to him. The correctness of three of the instruc-

tions is questioned. No one of them exhibits any obvious fault, and we are not specially advised by counsel in what the supposed error consists. In argument we are referred for light to the objections made at the time. These were merely general in their nature. It seems to us that on their face the instructions correctly applied the law to the facts; and as no specific inherent vice is brought to our attention, we do not feel called upon to discuss them.

But the principal question presented to us arises out of the action of the court in setting aside the answer to the special interrogatory, and entering judgment on the general verdict. For the defendant it is said that the gravamen of the action was fraud committed by the defendant; that the court, in setting aside the special finding, found that there was no evidence of fraud; and that with the question of fraud eliminated, there was nothing in the case to support a judgment against the defendant. We think counsel err in their construction of the court's ruling, and in their conception of the effect of the special finding upon the general verdict.

It is provided by section 199 of the code that in any case in which the jury render a general verdict, they may be required by the court to find specially upon any particular question of fact to be stated to them in writing, but that where a special finding is inconsistent with the general verdict, the former shall control the latter; and, by the terms of section 2164, Mills' Annotated Statutes, in any civil action founded on tort, if the jury shall state in their verdict that the defendant was guilty of either malice, fraud or wilful deceit, then the plaintiff may have execution against the body of the defendant upon the judgment entered upon the finding. A remedy is here provided which does not follow a general verdict. It is manifest that there was no inconsistency between the

general verdict and the special finding. By their general verdict, as well as by their answer to the interrogatory, the jury found that the transaction was fraudulent; and there being no question of inconsistency between the two, we do not think that the action of the court, in setting aside the special finding, was inhibited by the code provision. In our opinion, section 2164 of Mills' Statutes, contemplates an aggravated case—one in which the wrong is premeditated and intentional. A person may obtain the money or property of another by means of statements which are untrue, but of the truth or falsity of which he is without knowledge. In such case he might be held responsible as for a legal fraud, although there was no active intention to commit a wrong.—*Converse v. Blumrich*, 14 Mich. 108.

But while such representations have been held to be false and fraudulent in law, they lack the peculiar feature of guilt implied in the words "malice, fraud or wilful deceit," as used in section 2164. We think that from the connection of the word "fraud" with the words "malice" and "wilful deceit" it was intended to be understood in its odious sense. By denying the motion to set aside the general verdict the court held that there was evidence of fraud, and we cannot suppose that it intended to contradict itself; so that in setting aside the special verdict on the ground that it was not supported by the evidence, the court must have regarded the finding as having reference to actual and intentional fraud. The court was evidently of the opinion that the evidence did not warrant the extreme conclusion reached by the jury in their special finding, regarding, it, however, as amply sufficient to sustain the general verdict. Counsel are therefore mistaken as to the import of the court's ruling. This was not that there was no evidence of fraud, but that there was not sufficient evi-

dence upon which a verdict whose effect would be to deprive the defendant of his liberty, could be properly rendered. The court may have misconceived the evidence, but if it erred in setting aside the special finding, it was the plaintiff, and not the defendant, who was prejudiced by the ruling. The plaintiff is not here complaining, and the question whether, as to him, it was erroneous, is not before us.

The defendant now asks leave to file in this court a petition for reversal, alleging that since the trial and appeal a United States patent for the Cape May lode has been issued and delivered to the Cape May Mining and Leasing Company.

Our jurisdiction is appellate only. We are empowered to review the proceedings of the trial court, and correct errors, if any, which they may disclose; but this is the extent of our authority. Questions of fact which were not involved in the trial, can not be considered here, and leave to file the petition must be denied.

The judgment below will be affirmed.

Affirmed.

[No. 2702.]

THE TOWN OF FLETCHER V. SMITH.

Appellate Practice—Jurisdiction of Court of Appeals—Special Proceedings—Cities and Towns.

The statute conferring jurisdiction upon the court of appeals to review the final judgments of inferior courts in civil cases applies only to final judgments or decrees in actions at law or suits in equity, and does not apply to special statutory proceedings. The court of appeals has no jurisdiction to review a judgment of the county court in a proceeding under the act (Session Laws 1901, page 386) providing for the disconnection of outlying territory from cities and towns.

Appeal from the County Court of Arapahoe County.

Mr. O. N. HILTON, for appellant.

Mr. C. M. KENDALL and Mr. G. LEROY STEVICK, for appellee.

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20	315
20	316

WILSON, P. J.

An appeal is here attempted from the decree of the county court in a special statutory proceeding providing for the disconnection of outlying territory from towns and cities.—Laws 1901, p. 386.

The question presented on motion is whether this court has jurisdiction to review the decree either on appeal or on error.

This court was created not by the constitution, but by statute, and to the statute alone we must look to determine its jurisdiction. If it has no jurisdiction within the term of the act creating it, then it has none at all. We think the matter has been positively settled by the supreme court. The act creating the court of appeals provides that it shall have jurisdiction “To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.”—3 Mills’ Ann. Stats., sec. 1002d; Laws 1891, p. 119, sec. 4.

The supreme court in considering the special proceeding based upon the act of the legislature providing for the annexation of contiguous towns and cities, has said: “The proceeding which the statute requires shall be instituted, carried on and consummated, as the means of dissolving one municipality and annexing the same to another, is unquestionably a special statutory proceeding as distinguished from an ordinary action at law or suit in equity.”—*Martin v. Simpkins*, 20 Colo. 445; *Phillips v. Corbin*, 25 Colo. 66.

The act there in question, and the special proceedings for which it provided, were unquestionably of the same general character as the act and proceeding here under consideration, and the language which we have quoted is directly applicable to this proceeding. It is true that in the *Simpkins* case, the supreme court held that it had jurisdiction to re-

view the decree upon error, because the proceeding was judicial in its nature, and the decree was a final judgment, and therefore it had such jurisdiction because of a special provision of the constitution which provided that writs of error should lie to the supreme court for every final judgment of the county court.—Constitution, sec. 23, art. 6.

The constitutional provision, however, does not apply to nor affect this court. As the statute now reads, this court is restricted and limited in its right to review even final judgments or decrees of an inferior court to those which are rendered in an action at law, or suit in equity. By reason of the above cited constitutional provision, the supreme court is not so limited and restricted. In the Corbin case it was said, "No appeal from such judgment is provided for in the act itself, and there is no constitutional right to an appeal from the county court to the district court. Such right exists only when the legislature has expressly, or by clear implication, declared in its favor.—*Callahan v Jennings*, 16 Colo. 471. Being therefore a special proceeding, it does not fall, as we have seen, within the class of cases over which appellate jurisdiction is conferred upon the district court by the act of 1885."

It is true that the court was there considering the right of an appeal from a decree in a special proceeding regarding the annexation of towns, to the district court, but identically the same principle is involved as in an attempted appeal in a special proceeding from the county court to this court, and the language is directly applicable. In the third subdivision of the section of the act defining the jurisdiction of the court of appeals, it is provided: "Writs of error from, or appeals to, the court of appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided

by law for such reviews by the supreme court." It is clear that this language refers only to such final judgments of inferior courts as the court of appeals was given the right to review by the first subdivision of the section. A precisely similar question was involved in the Corbin case, and it was so held.

We must not be understood as intimating that jurisdiction to review the judgment or decree in a special proceeding which does not constitute an action at law or suit in equity might not be conferred upon this court by legislative enactment. In the absence, however, of a statutory provision to that effect, as is the case here, the contention that such jurisdiction exists cannot be upheld. Our conclusion is that this court is without jurisdiction to review, either upon appeal or on error, the decree rendered by the county court in this special proceeding, and hence the motion to dismiss must be sustained.

The appeal will be dismissed.

Appeal dismissed.

[No. 2152.]

ROSS v. SMILEY.

Principal and Agent—Commission—Contracts—Offer and Acceptance.

Defendant by oral instructions authorized plaintiff, her agent, to dispose of certain real estate for a certain amount in cash and an exchange of certain real estate belonging to the proposed purchaser, defendant to assume an encumbrance existing on the property to be taken by her in exchange and the purchaser to assume an encumbrance existing on defendant's property, the principal sum of the encumbrance being named in each case. Plaintiff submitted the proposition to the proposed purchaser who accepted by wire, directing that his attorney prepare the contract of sale which would be signed by his agent and that the contract should make the deal subject to perfect titles and interest on encumbrance, rents and insurance in each case to be adjusted to date of contract. Defendant refused to consummate the sale. Held, that defendant's oral proposition implied that if

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20	168
20	494

accepted the agreement should be made effective by being reduced to writing; that the term "perfect title" used in the acceptance was synonymous with marketable title, and that defendant's proposition implied that the titles should be marketable; that defendant's proposition naming the principal of the encumbrance in each case implied that each party should pay the interest on their respective encumbrances up to the date of the contract, and the law implied that each party was entitled to collect rent on his or her property and should bear the expense of insurance, if any, up to the time of the contract of sale. That the acceptance of defendant's offer was unqualified, and the proposed purchaser being ready, willing and able to comply with the terms of the proposition, defendant was liable to plaintiff for commission.

Error to the District Court of Arapahoe County.

MR. WILLIAM L. DAYTON and Mr. JAMES C. STARKWEATHER, for plaintiff in error.

MESSRS. BENEDICT & PHELPS, for defendant in error.

GUNTER, J.

This was an action by a real estate agent to recover commissions. At the close of plaintiff's case the court ruled, "I will grant the motion for a nonsuit on the ground of failure to show an acceptance of the offer by the purchaser, * * *." To review the ruling is this proceeding. The facts were: Defendant owned the Smiley Block in the city of Denver, upon which was an encumbrance in the principal sum of \$30,000.00. Charles W. Fulton, residing in Scranton, Pennsylvania, knew the property, of the encumbrance thereon, and that plaintiff was defendant's agent for its sale. Fulton owned real estate in the city of Boulder, consisting of a terrace, unencumbered, and property known as the "Sig" house, encumbered to the extent of \$2,500. With this property of Fulton, and the encumbrance thereon, defendant was acquainted. George L. Hodges was the attorney for plaintiff in the city of Denver. While the parties were thus situated, and thus informed, de-

fendant authorized plaintiff to dispose of the Smiley Block for \$40,000.00 in cash, the assumption of the encumbrance of \$30,000.00 and the conveyance to her of the above terrace property unencumbered, and the "Sig" house subject to an encumbrance of \$2,500.00, agreeing to pay him in case such trade was effected the usual and customary commissions of a real estate agent in like case. Plaintiff telephoned this proposition to the agent of Fulton, Richard T. Fulton, at Boulder. The latter on receiving the message telegraphed Fulton at Scranton.

"Smiley will accept cash forty thousand, assume thirty thousand, terrace and equity Sig house, leaves out all lots, may possibly work small second trust but fear not, good bargain, would urge deal, writing particulars."

In reply Charles W. Fulton telegraphed plaintiff:

"Have Hodges make contract, Richard will sign for me as agent, have it read deal subject to perfect titles, and interest on encumbrance, insurance and rents in each case to be adjusted to date of contract."

On receipt of this message plaintiff informed Mrs. Smiley that her proposition had been accepted, and requested that it be embodied in a written contract. Without questioning the acceptance or offering any reason for refusal she declined to do this, and refused to consummate the sale.

Charles W. Fulton, by deposition, testified to his having accepted defendant's proposition, and that he was at the time of such acceptance, and for some time thereafter, ready, willing and able to carry out the terms of defendant's proposition. It was contended below, and is here, that the telegram was not an unqualified acceptance of the proposition of defendant. We think it was. The defendant had not authorized plaintiff in writing to make the proposition conveyed by him to Fulton, a mere acceptance, therefore, would not constitute a binding contract between

her and Fulton, to make it so the agreement reached through the proposition and its acceptance should be reduced to writing. The proposition of defendant implied that if it were accepted the agreement so reached should be made effective as between her and Fulton by being put in binding form as a written contract.

“Have Hodges make contract, Richard will sign for me as agent,” was in effect to say “I accept the proposition, reduce the agreement we have reached to writing, Richard will sign for me as agent,” which amounted to nothing more than the unqualified acceptance of the proposition of the defendant which impliedly contained the offer to reduce the agreement to writing in the event it should be accepted. “Have it (the contract) read subject to perfect title.” A perfect title in this connection is synonymous with a marketable title.—*Birge v. Bock*, 44 Mo. App. 69, 77; *Smith v. Robertson*, 23 Ala. 312, 319.

It was implied in the proposition to sell that defendant would give a marketable title.—*Taylor v. Williams*, 2 Colo. App. 559, 562, 31 Pac. 504; *Goddling v. Decker*, 3 Colo. App. 198, 203, 32 Pac. 832.

Requiring “subject to perfect title” to be provided in the contract of sale was requiring to be expressly stated nothing more than defendant had impliedly agreed to state in the contract of sale in the event of her proposition to sell should be accepted. “And interest on encumbrance, insurance and rents in each case to be adjusted to the date of the contract.” According to the proposition and its acceptance Fulton was to assume the principal of the encumbrance of \$30,000.00, and defendant was to assume the principal of the encumbrance of \$2,500.00. The law is, that to the date of the contract of sale the vendor is the owner, and thereafter the vendee is the owner of the property.—1 Warvelle on Vendors, 1st

ed. 195, 205-6-7; *Christian v. Cabell*, 22 Gratt. 83; *Skinner v. Houghton*, 92 Md. 68; *Dunn v. Yakish*, 10 Okl. 388.

It was, therefore, implied in defendant's proposition that the interest on the encumbrance of \$30,000.00 must be paid by defendant up to the contract of sale, and that the interest on the encumbrance of \$2,500 must be paid by Fulton up to the same date, this being the date when the ownership of the real estate involved changed. This being true, the interest upon the respective loans should have been adjusted to the date of such contract. The law implied that Fulton would be entitled to the rents on the property contracted to be sold by him up to the contract of sale, and Mrs. Smiley would be entitled to the same thereafter.—1 Warvelle on Vendors, 194-5; Maupin on Marketable Title to Real Estate, 766.

The same rule was applicable to the property contracted to be sold by the defendant; the implication would require an adjustment of the rents to the date of the contract of sale. If the property involved were insured, the respective owners should bear the expense of insurance to the date they ceased to be owners thereof, that is, to the date of the contract of sale, therefore the insurance should be adjusted to such time. The provision of the telegram, that insurance and rents should be adjusted to the date of the contract amounted to nothing more than expressly stating what defendant had impliedly offered to do by her proposition to sell. The message from Fulton to plaintiff, expressed nothing other than implied in the proposition of sale, it was an unqualified acceptance thereof. The purchaser was able to carry out the terms of the contract so made. The agent—plaintiff—had, therefore, procured a purchaser ready and willing to enter into a binding contract to take defendant's property upon her terms, and able to fulfill

them. This being true, the agent had made out a case against his principal for the commissions claimed.—*Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Finnerty v. Fritz*, 5 Colo. 179; *Cawker v. Apple*, 15 Colo. 141, 25 Pac. 181; *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, 30 Pac. 255.

Judgment should be reversed.

Reversed.

[No. 2243.]

THE DENVER LIFE INSURANCE COMPANY v. BUCKNUM.

Life Insurance—Lapsed Policy—Reinstatement.

A policy of life insurance was declared forfeited for failure to pay the premium due, and the insured was reinstated in a policy of a smaller amount which he accepted and paid the premium due. In an action upon the reinstated policy where the company defended on the ground that the policy had been cancelled by the company because of false representations as to health made in the application for reinstatement, a judgment in plaintiff's favor on the sole ground that the first policy had not lapsed for the reason that the company failed to give notice that the premium was due as required in the policy, was rendered upon an issue not in the case, and where there was no finding of the trial court upon the question of the false representations of the insured in his application for reinstatement, which was the only issue in the case, the judgment must be reversed.

Appeal from the County Court of Arapahoe County.

Mr. A. J. RISING, Mr. J. C. HELM and Mr. E. E. EDMONDS, for appellant.

Mr. C. J. BLAKENEY, for appellee.

THOMSON, J.

On the 11th day of August, 1896, The Denver Life Insurance Company issued and delivered to Dr. Henry H. Bucknum its policy of insurance, whereby it insured his life in the sum of \$5,000 for the benefit of Elsie M. Bucknum, his wife. The consideration for

the policy as expressed in the instrument was, among other things, the full payment of the first annual premium, \$73.56, and the agreement of the insured that further payments should be made annually, semi-annually, quarterly or monthly in advance. Dr. Bucknum was one of the medical examiners for the company, it was contemplated that the fees for examinations, which he was to receive from the company, would be enough to cover the premium and the further payments. Some time afterwards it was found that the company was unable to furnish him with a sufficient number of examinations to carry the amount of insurance named in the policy. After this fact had been ascertained, Charles E. Channell, secretary of the company, and Dr. Bucknum had several conversations on the subject, in which the doctor said that he was dependent upon the examinations to carry his policy, and was without funds to make good the deficiency. The total amount earned by him as examiner was insufficient to keep the policy in force after August 11, 1897; and in subsequent conversations with him he was notified by the president that his policy had lapsed. The doctor was desirous of insurance, and on the first day of September, 1897, it was agreed that the amount of the insurance should be reduced to \$2,000; and, accordingly, on that date, the doctor made and subscribed the following application to the company:

“APPLICATION FOR REINSTATEMENT AND WARRANTY OF
HEALTH TO THE DENVER LIFE INSURANCE
COMPANY, DENVER, COLORADO.

“Whereas, a premium payment upon my policy No. 7 became due and payable on the 11th day of August, 1897, and by reason of the nonpayment of said premium when due my policy expired,

“Now, therefore, I, H. H. Bucknum, of Denver, occupation physician, do hereby apply to The Denver

Life Insurance Company, for reinstatement of my policy, and tender the amount of past due payment of \$15.46, which will carry the payment upon my policy to February 11, 1898. In consideration of the same being accepted and my policy restored to regular standing, I agree as follows:

“First. I warrant that I am now of temperate habits, in good health and free from all infirmities. That since the date of my original application I have had no disease, injury, infirmity or illness, nor had any medical attendance, or advice for any illness except as follows, viz.:

“Second. I hereby agree that if any of the statements and warrants above given are not full, complete and true, that the acceptance by The Denver Life Insurance Company of this or any other payment shall not make a valid claim under said policy, and the only liability against The Denver Life Insurance Company shall be the amount of this and subsequent premium payments with compound interest added at four per cent. per annum.

“Dated at Denver, this 1st day of September, 1897. “H. H. Bucknum.”

The company accepted the application and, on the same day, altered the old policy except as to its date, so as to adapt it to the new contract, and delivered it to him. The alteration was made by erasing the word “five” where the amount of the insurance was named, and inserting the word “two,” and by erasing the figures representing the payments which were required to maintain a policy for \$5,000, and inserting figures representing the payments required to support a policy for \$2,000. At the foot of the policy these words were written: “This policy reduced to \$2,000, from August 11, 1897. C. E. Channel, Secretary.” The doctor elected to make his payments semi-annually. The amount of each of

such payments was \$15.46; and by the alteration it was so made to appear in the policy. The semi-annual premium on the \$5,000 policy was \$38.63. The doctor made his first payment immediately. About two months afterwards it came to the knowledge of the officers of the company that when the doctor made the application he was suffering from a disease known as paretic dementia. A meeting of the board of directors was immediately called, at which it was determined to refund the money paid by him, and notify him that his policy was cancelled. Accordingly, on September 16, 1897, the secretary wrote the doctor a letter, enclosing a check for the premium paid by him and advising him that his policy had been cancelled. The doctor refused to accept the check and returned it. It was then sent to his wife, and she also returned it. The doctor died on the 13th day of March, 1899, and Mrs. Bucknum brought this suit to recover the amount named in the policy.

The complaint alleged the issuance of a policy to the doctor for \$2,000, setting forth the instrument and its attached conditions in full; alleged the death of the insured, the performance of all the conditions of the policy by him and by the plaintiff, and demanded judgment for \$2,000. The answer admitted the execution and delivery of the policy and the death of the insured, and after setting forth the facts in connection with the original insurance for \$5,000, the failure of the insured to pay the premiums due, the consequent forfeiture of the policy, the application of the insured for a reinstatement of the policy, the payment by him of the amount of the semi-annual premium of \$15.46 on the policy as altered, averred that the statements of the insured as to his health, in his application for that policy, were false, and were known by him to be false at the time they were made; that he was at that time and for a long time before

had been, suffering from a disease known as paretic dementia, and which resulted in his death; that he was then being, and before making his application had been, treated by a physician for that disease; that these facts were unknown to the company when it allowed the reinstatement and changed the policy; but that immediately when it became advised of them it sent to the doctor its check for the amount of the premium he had paid, notifying him that by reason of his misrepresentations his policy had been cancelled, but he refused to receive it and returned it, as did also his wife, the beneficiary, to whom it was subsequently sent.

The replication admitted the allegations concerning the disease from which the doctor was suffering, and admitted that it finally resulted in his death; but averred that at the time he made the application his mind was so shattered that he was incapable of judgment in relation to his statements. The replication further denied knowledge or information sufficient to form a belief as to the other allegations of the answer.

Dr. Eskridge, the physician under whose care Dr. Bucknum was from December, 1896, until April or May, 1897, and who frequently met and conversed with him afterwards, testified that in April his mental symptoms, the meaning of which were at first undeterminable, clearly indicated paretic dementia, and that the disease progressed rapidly; that the effects of his disorder were hallucinations that he was perfectly well and that he was about to come into the possession of great wealth; that in May he refused to submit to treatment for the reason that, being entirely well, his condition did not require it; that his memory was very poor; and that about the first of September he could not reason intelligently on the question of his health. The witness also testified that a person afflicted with paretic dementia has a false

conception of his health; and, if the mental symptoms are well developed, has an extravagant sense of being well. It was shown, however, that during the period covered by the testimony of Dr. Eskridge, Dr. Bucknum was practicing his profession, giving out prescriptions—the last being dated September 1, the day he made the application—and that these prescriptions all indicated sound judgment. It was also shown that in the conversations between Dr. Bucknum and the secretary of the company respecting the original policy, his inability to make the payments necessary to sustain it, and his desire for its reinstatement, his recollection of the antecedent facts was accurate, and to all appearances he had full control of his faculties. It also appeared that on the 11th day of February, 1898, the 11th day of August, 1898, and the 11th day of February, 1899, the plaintiff tendered to the defendant \$15.46 as the premium due by the terms of the policy on each of those days.

Among the conditions and stipulations annexed to the policy was the following:

“Thirty days’ notice before payment is due, except when monthly payments are made, will be mailed to the insured from the home office to the last known address as it appears upon the books of the company. Failure to make any payment at the home office on or before the day when due, whether the insured does or does not receive such notice, hereby cancels this contract and releases the company and the insured from any further liability, and all payments made on account thereof shall be forfeited to the company.”

In the course of the examination of one of the defendant’s witnesses the fact was elicited that while Dr. Bucknum was the holder of the original policy for \$5,000, no notice that payments would become due was ever mailed to him. The court rendered judg-

ment for the plaintiff for the amount payable by the terms of the new policy, on the sole ground that the notice provided for in the stipulation we have quoted was not given; holding that by reason of the failure to give the notice, the original policy never lapsed. The defendant appealed.

This suit was not brought upon the original policy. The complaint set forth the policy for \$2,000, which required the payment of a semi-annual premium of \$15.46. By tendering the premium for the payment of which that policy provided, and by bringing her suit upon that policy, averring the performance by the insured and by her of all the conditions of the contract evidenced by that policy, the plaintiff, at least so far as this suit is concerned, adopted the act of her husband in procuring it. Whether the original policy had lapsed is, under the pleadings, not a question for judicial determination. In deciding that the first policy was still in force the court went outside of the case made by the pleadings. These presented but one issue, and that related to the nature of the representations made by the insured respecting his health in his application for reinstatement. The language is that of a warranty, but the defendant has chosen to regard it merely as conveying representations, and we shall allow it no different effect. Those representations are alleged to have been not only untrue, but untrue to the knowledge of the insured when made. The charge was that they were wilfully and intentionally false. The question therefore was whether the insured knowingly misrepresented his condition. There was evidence to warrant the conclusion that, owing to a state of mind for which he was not responsible, he thoroughly believed himself to be in perfect health, and the fact that he had been under the care of a physician had vanished from his memory. If such was the case, his state-

ments were not intentionally false. On the other hand there was evidence to justify an inference that his capacity for recollection of past events had not been impaired, and that, therefore, the fact that he had been the subject of medical attendance could not have been forgotten. Upon the question whether the insured knew his statements to be false when he made them the court ventured no finding. That question was the only one presented by the pleadings, and without its determination no judgment could be properly rendered in the suit. The necessary finding cannot be made here, and the judgment is reversed and remanded for trial and decision of that issue. Upon the question what the effect of proof of the applicant's insanity when he made the application would be so far as concerns the original policy, we express no opinion, because it is not presented by this record.

Reversed.

[No. 2191.]

THE CERRUSITE MINING COMPANY v. STEELE.

1. Contracts—Written and Parol—Variance—Evidence.

A written contract whereby plaintiff agreed to establish a store and boarding house at defendant's mining camp and to furnish supplies and board to defendant's employees, and in which defendant agreed to aid plaintiff in collecting board and store accounts from its employees, without specifying how such aid was to be rendered, was not varied by a subsequent oral contract wherein defendant agreed to pay the board and store accounts of its employees to plaintiff and deduct the same from their wages, and in an action by plaintiff against defendant to recover such accounts the verbal contract was admissible in evidence.

2. Contracts—Statute of Frauds—Promise to Pay Debt of Another—Pleading.

In an action upon an oral contract the defense that it was an agreement to answer for the debt of another and void under the statute of frauds because not in writing is not available to defendant unless the statute be pleaded.

3. Same—Money Had and Received.

Where defendant agreed to pay the board and store bills of

its employees to plaintiff and to deduct the same from their wages and did deduct from their wages the amount of such bills, the amounts thus deducted became so much money received by defendant to plaintiff's use and the debt became defendant's own and it cannot interpose as a defense thereto that it was an agreement to answer for the debt of another.

4. Evidence—Former Trial—Stenographer's Notes.

The notes of the official stenographer of the county court, of the evidence of a witness, are not admissible in the trial of the same cause in the district court to prove the testimony of such witness in the absence of a stipulation to that effect.

Appeal from the District Court of Arapahoe County.

Messrs. MCGINTIE & ANDREWS, for appellant.

Mr. ARTHUR M. EDWARDS and Mr. GEORGE C. MANLY, for appellee.

WILSON, P. J.

The parties to this suit entered into a written contract whereby it was agreed that the plaintiff, Steele, should place a stock of goods and maintain a store at the place where defendant company was conducting mining operations, and that he would also take charge of and maintain a boarding-house at such place for the boarding, at a stipulated price per week, of defendant's officers and employees. The defendant company agreed to furnish a store room, and the boarding-house and utensils connected therewith, rent free. Among the stipulations in the contract was one that defendant "agrees to aid said Steele in collecting board, and in all legitimate ways in sustaining said store and boarding-house." This suit was brought by Steele to recover the amount of the balance alleged to be due to him for the board and store accounts of a number of defendant's employees. Judgment was in his favor for the full amount claimed, and from this defendant appeals.

It was shown by the evidence on the part of

plaintiff that after putting in the stock of goods and taking charge of the store and boarding-house, but before commencing to operate them or opening any accounts, it was agreed verbally between plaintiff and the general manager of the defendant company that the company would pay to plaintiff the board and store accounts of the employees, and deduct such amount from their wages. That thereafter, in pursuance of this verbal agreement, it was the uniform practice and custom of the parties for Steele to render direct to the company, twice a month, a statement of his account, showing the amount due to him by each employee for board and on store account; that this statement of account was audited by the manager of the company and paid to plaintiff by the company's treasurer. Nine such statements were rendered, audited and paid. Three other statements were rendered and audited by the general manager, but were not paid upon presentation to the treasurer, owing to lack of funds in the treasury, and these are the subject of this suit. It was further shown that Steele never rendered any accounts to the employees, but to the company direct as has been stated, and that the sums due upon the statements of account involved in this suit had been deducted by the company from the wages of the employees. No evidence was offered on the part of defendant.

The oral testimony received with reference to the verbal agreement between plaintiff and the general manager did not tend to vary the terms of the written contract. The latter contained only a general understanding on the part of the defendant to aid the plaintiff in every legitimate manner in the collection of his accounts. There was no attempted specification as to how or in what manner this aid should be extended. As it then stood, it was of no practical or legal effect. Plaintiff could not have

maintained an action upon it. The verbal agreement went a step further, but by no means conflicting or varying with the written contract, and provided how this assistance should be rendered. The provision, too, it is a matter of common knowledge, is one customary in enterprises of that character, and one which, nothing appearing to the contrary in the case here presented, was within the scope and authority of the general manager to enter into. The verbal contract was manifestly a separate and independent one, and evidence as to its terms was clearly admissible. It is upon this contract the suit is based, and can be maintained.

It is claimed, however, that this agreement was one to answer for the debt of another, and hence not being in writing, came within the inhibition of the statute of frauds. The evidence shows the undertaking was primary, not collateral.—*Coal Co. v. Liddell*, 69 Ill. 640. Conceding, however,—which we do not,—that it was an agreement to answer for the debt of another, it can avail defendant nothing. For one reason, and a conclusive one, the statute was not pleaded.—*Hamill v. Hall*, 4 Colo. App. 296. For another, equally conclusive, it appears that the defendant had withheld from the wages of its employees, and therefore collected, the amounts due in money to plaintiff upon these several statements of account, and instead of paying it over to plaintiff, had retained it. It became, therefore, so much money received by it to the use of plaintiff, and having received and retained it, the debt became its own, and not that of another.—*Hamill v. Hall*, *supra*.

There was no stipulation that the testimony given by a witness on the trial of the cause in the county court should be proved on the trial in the district court by the notes of the official reporter of the

county court, and it was not error to exclude such offer.

The judgment will be affirmed. *Affirmed.*

[No. 2221.]

DE CUNTO, BARRA & COMPANY v. JOHNSON.

1. Mortgages—Foreclosure—Parties.

Where the grantor in a deed of trust has disposed of all his interest in the premises covered by the deed of trust, he is not a necessary party to an action to foreclose such deed of trust where no personal judgment is sought against him.

2. Mortgages—Foreclosure—Sheriff's Deed—Order of Court Approving Sale.

A sheriff's deed made in pursuance of the certificate of sale on the foreclosure of a mortgage is not void because no order of court approving the sale was made prior to the execution of the deed.

Appeal from the District Court of Arapahoe County.

Messrs. WARD & WARD, for appellants.

Mr. HENRY HOWARD, Jr., for appellee.

GUNTER, J.

Action upon warranty of title in bill of sale. Trial to the court. Judgment for plaintiff. Defendant appeals.

June 27, 1896, The Metzner Liquor Company was in possession of a lot, a part of the public domain, and owned the frame building situate thereon. To secure an indebtedness to The Milwaukee Brewery Company it gave a trust deed on its possessory interest in the lot and upon the building. August 31, 1896, The Metzner Liquor Company gave a chattel mortgage upon the frame building to secure an indebtedness to appellants. Being unable to meet this indebtedness the mortgagor delivered possession of the building so mortgaged to appellants, who by bill

of sale containing warranty of title sold the same to appellee.

The Milwaukee Brewery Company instituted an action to foreclose the above trust deed, and to have its interests in the building covered thereby declared superior to the interest of appellants, and to the interest of appellee therein. Appellants and appellee were made parties to this action, and appeared therein. A decree was entered ordering sale of the property covered by the trust deed and adjudging the lien of The Milwaukee Brewery Company thereon superior to the chattel mortgage to appellants and the bill of sale to appellee. A sale was made by the sheriff under the decree so rendered, a certificate of sale issued, and later, in pursuance thereof, a sheriff's deed. The holder of such deed took possession of the building embraced therein. Johnson, the purchaser under the bill of sale having thus lost the property covered thereby, brought the present action to recover damages for a breach of the warranty of title contained therein. As stated he had judgment below.

Appellants contend that this apparently righteous judgment should be set aside; they contend that the above decree foreclosing the trust deed and adjudging the lien thereof superior to the interest of appellants acquired under the chattel mortgage, and the interest of appellee acquired under the bill of sale, was void because the grantor in the trust deed was not made defendant to such foreclosure proceeding. The Metzner Liquor Company, the trustor in the trust deed foreclosed, had parted with all interest held by it in the property covered by the trust deed by a sale of such property to appellants. It was not sought in the foreclosure proceeding to recover a personal judgment against The Metzner Liquor Company, the relief sought was to sell the

property covered by the trust deed, and apply the proceeds of such sale upon the indebtedness secured thereby, and to have the lien evidenced by such trust deed declared superior to the claims of appellants, and the claim of appellee. The Metzner Liquor Company had no interest in the proceeding, the only parties interested therein other than plaintiff were the defendants, the present appellants, and appellee. They had the opportunity by being made defendants to such proceeding to contest the validity of plaintiff's lien under the alleged trust deed, and its alleged superiority to their respective claims.

We can see no reason why The Metzner Liquor Company was a necessary party to such proceeding.

It is further contended, that the property covered by the trust deed was not the same property as that advertised for sale, and was not the same property as that contained in the bill of sale. By parol testimony it appears that it was.

It was further contended that the sheriff's deed made in pursuance of the certificate of sale was void because an order of court approving the sale was not made previous to the execution of this deed. This, under our statute was not necessary.

The judgment below should be affirmed.

Affirmed.

[No. 2215.]

PATRICK ET AL. V. MORROW.

Appellate Practice—Judgment in Favor of Appellant—Bills and Notes.

Where action was brought upon a promissory note with a prayer to have it declared a lien upon real estate and plaintiff recovered personal judgment on the note but the other relief prayed for was denied, the final judgment was in plaintiff's favor and he is not entitled to an appeal therefrom but may have the same reviewed in the court of appeals by writ of error, and where an appeal was taken by plaintiff from such judgment to the court of appeals it will be dismissed and redocketed on error.

Appeal from the District Court of Pueblo County.

Mr. C. S. ESSEX, for appellants.

WILSON, P. J.

Appellants as plaintiffs brought suit to recover on a promissory note of which the defendant was maker, and of which they were payees. Judgment was prayed upon the note, and also that such judgment be decreed a lien upon certain real estate belonging to defendant, and that such lien be enforced. Personal judgment was rendered against defendant for the amount of the note with interest and costs, but the other relief prayed for was denied. Plaintiffs did not secure all of the relief demanded by them, but the final judgment that was rendered was unquestionably in their favor. In such case an appeal by them will not lie. If they, as the prevailing party, are dissatisfied with the judgment rendered, they can have it reviewed in the appellate court only by writ of error.—*Bogert et al. v. Adams et al.*, 5 Colo. App. 510; *Booth v. Water Co.*, 9 Colo. App. 496; *Colorado Fuel & Iron Co. v. Knudson*, post 383; *Hall v. Pay Rock C. M. Co.*, 6 Colo. 81; *Harvey v. Ins. Co.*, 18 Colo. 356; *Fischer v. Hanna*, 21 Colo. 13.

The appeal must be dismissed, but as it appears that this court would have jurisdiction to review the judgment if it were here by writ of error, it is ordered as provided by statute that the clerk docket the cause on error.

Appeal dismissed.

[No. 2169.]

**MOLIQUE v. THE IOWA GOLD MINING AND MILLING
COMPANY.**

Negligence—Fellow Servants.

Defendant was the owner of a mine and mill connected by a tramway used to haul the ore from the mine to the mill. The

18	223
34s	44

mill was only used to crush ore from defendant's mine, and the mine and mill were operated as one enterprise. Held, that plaintiff, the superintendent of the mill, whose duty it was to operate it, and the employees at the mine who handled the ore, were fellow servants and an injury to plaintiff caused by a sledge hammer being negligently mingled with the ore at the mine and shipped to and fed into the mill was the result of the negligence of a fellow servant for which defendant was not liable.

Error to the District Court of San Juan County.

Mr. J. C. HELM and Messrs. STUART & MURRAY,
for plaintiff in error.

Messrs. BARNES & BARNES, for defendant in
error.

GUNTER, J.

Defendant had judgment on the pleadings. Plaintiff is here on error. The pleadings consisted of complaint, answer and replication. The complaint alleged that defendant as owner was operating a mine and mill, distant from each other about one mile and a half, and connected by a tramway conveying the ore from the mine to the mill where it was fed into the crusher; that the operation of the mine and the mill was one enterprise, and under one general manager with power to determine the number of men employed, to employ and discharge them; that plaintiff, a millwright, was superintendent of the mill with duty to operate it; that on several occasions prior to the date of the accident involved, through the negligence of defendant, miners' tools and other like articles were mingled with the ore at the mine, conveyed to the mill, and to the peril of the mill and all the employees engaged therein, including plaintiff fed into the crusher; that plaintiff on several occasions reported to defendant through its general manager the fact that said implements, and other dangerous articles, were being carried into the

mill and fed into the crusher, and that plaintiff was informed that such negligent practice of the defendant would be stopped; that plaintiff believing that such practice would be stopped, and relying upon defendant's assurance to that effect, continued to discharge his duties as superintendent of the mill; that thereafter, through the carelessness of defendant a sledge hammer got into the ore at the mine, and through the negligence of defendant was carried with said ore to the mill and there fed into the crusher; that the said hammer became wedged between the jaws of the crusher and stopped the same; that defendant's duty as superintendent was to keep the mill continuously running; that with the aid of other servants of defendant he attempted to remove the hammer; that while standing over the crusher attempting to effect the removal, the hammer flew out and struck him. To recover damages for injuries so sustained was the action.

It appears from one of the grounds of defense, and is not denied by the replication, that such mill is used only for crushing of ore taken from defendant's mine; that the mine and mill constitute one enterprise under one general manager, and that all employees working in said enterprise are under employment of, and their wages paid by, defendant.

Plaintiff contends that the alleged negligence in permitting the hammer to get into the ore at the mine, and in permitting it to be carried by the tramway to the mill, was that of defendant, and was the proximate cause of plaintiff's injuries.

Defendant contends that such alleged negligence was that of a fellow servant. Further, that such negligence was not the proximate cause of the accident.

If the alleged negligence was that of a fellow servant it is decisive of the case.

“The personal duties that the law imposes upon the master are well-defined and understood, and are such as relate to the furnishing and keeping in repair of reasonably safe machinery and appliances for carrying on his business; a reasonably safe place in which to render the service, and the exercise of reasonable care in the selection of competent co-workmen; in brief, such acts as pertain to construction, preservation and management, as distinguished from the work of operation.”—*D. & R. G. R. R. Co. v. Sipes*, 23 Colo. 229, 47 Pac. 287.

“As between master and servant, the duty of planning a business, and all duties pertaining to the safety of the service—such as the place to work, the implements and machinery, the plans and rules after which the work is to be conducted, the choosing of the fellow servants, and whatever else is within the same reason—must be discharged either by the master in person, or by a vice-principal for whose neglects and other wrongs therein he will be responsible as for his own. On the other side, the running of the business, with and in pursuance of the plans, rules, appliances, helps and helpers thus provided—in other words, the execution of the work—is of the assignable sort, rendering all persons engaged therein fellow servants, so that, if the master used due care in selecting his servants, he will not be responsible to one for an injury produced by the negligence or other default of another.”—Bishop on Non-Contract Law, § 665.

It is not complained that defendant was negligent in providing machinery or other implements with which to carry on the enterprise of mining and milling, nor is it charged that defendant failed to exercise the requisite care in the selection or retention of its employees. The charge is, that it was negligent in permitting in the course of the operation of

the enterprise the hammer mentioned to be mingled with the ore, and to be conveyed with the ore to the mill, and to be fed into the crusher. This alleged negligence was in the operation of the enterprise, and not in the construction, preservation or management of the plant. This being true the negligence charged was that of a fellow servant.

“The specific act in connection with which the negligence occurs is the criterion by which the liability of the company is fixed, rather than the rank of the servant who performs the act.”—*D. & R. G. R. R. Co. v. Sipes, supra*.

If we assume, therefore, that the alleged negligence in permitting the presence of the hammer in the ore and its conveyance and feeding to the crusher was the proximate cause of plaintiff's injuries—a point we do not decide—such negligence was that of a fellow servant for which defendant was not liable.—*D. & R. G. R. R. Co. v. Sipes, supra*, and authorities cited.

We think the trial court was right in entering judgment upon the pleadings. Its judgment will be affirmed.

Affirmed.

THOMSON, J., dissenting.

[No. 2206.]

SMITH V. BULKLEY ET AL.

1. Corporations—Ultra Vires—Injunction—Suit by Stockholder.

A stockholder of a corporation cannot maintain an action to enjoin the foreclosure of a deed of trust to corporate property executed by the president and secretary of the corporation, on the ground that it was executed without authority and for the private benefit of the president, without first showing that proper effort had been made to have the action brought by the corporation and that the officers of the corporation had refused to bring the action, and that he had also exhausted all reasonable efforts to obtain relief through the stockholders as a body or that such efforts would be unavailable.

2. Same.

Where a corporation was enjoined from bringing any action to prevent a foreclosure sale under a deed of trust to corporate property, the injunction was binding on the stockholders and prevented them from bringing any such action.

Error to the District Court of Pitkin County.

Mr. A. S. BLAKE, Mr. L. J. STARK, Mr. T. J. O'DONNELL and Mr. J. WARNER MILLS, for plaintiff in error.

Messrs. THOMAS, BRYANT & LEE, for defendants in error.

GUNTER, J.

A general demurrer to the complaint was sustained and a judgment of dismissal entered. Plaintiff appealed. The allegations of the complaint pertinent to this ruling are: Plaintiff is and was at all times mentioned therein a stockholder of The Tabor Mines and Mills Company, a corporation; and sues for himself and others similarly situated. June 12, 1893, the president and secretary of the corporation gave a note and trust deed, the latter on corporate real estate, with the purpose of borrowing funds for the individual use of said president; obtained the same thereby, and the money so obtained was so used. All of which facts were known to the lender of the money, and the present holder of the note, Frederick G. Bulkley. On May 23, 1896, the trustee in the above trust deed advertised the property covered thereby for sale June 15 next thereafter. This action was brought against The Tabor Mines and Mills Company and three of its directors, to have the noticed sale enjoined and the note and trust deed cancelled, the plaintiff contending that the giving of the note and trust deed was an *ultra vires* act of the president and secretary of the corporation.

It further appears from the complaint that four

directors of the corporation, for the first year of its existence, were named in the articles of incorporation at the time of the organization of the corporation March 16, 1893, and that no election of directors had been held since.

The act complained of, the giving of the note and trust deed, was an alleged attempt to misappropriate assets of The Tabor Mines and Mills Company, it was, therefore, a wrong attempted against the corporation, a direct wrong to it, and only an indirect wrong to the stockholder, the plaintiff herein. The right to bring an action to redress this wrong was in the corporation which sustained it. The wrong was committed June 12, 1893, the present action for relief was instituted by plaintiff June 8, 1896.

As to when he first ascertained that the wrong had been committed the complaint is silent. It does not appear that he or any other person at any time, although three years elapsed between the giving of this note and trust deed and the institution of this action, requested the board of directors of defendant corporation to institute this suit, nor is any explanation offered as to why he made no effort to induce action by the proper corporate officers for relief from the alleged wrong. No allegation is made of any effort to have the stockholders take steps, by removal of the board of directors or otherwise, for righting this alleged wrong. So far as we are advised by the complaint the stockholder instituted this action to redress the alleged corporate wrong without ever having made any effort, through the officers or stockholders of the corporation, to have such action brought, and without offering any explanation why such application was not made by him before institution of this action. The authorities are as one that under such circumstances an action by the stockholder will not lie. The powers of a corporation are

exercised by the stockholders in legal session, the board of directors and other agencies. It is necessary for the economic and efficient management of a corporation that its powers be exercised by the proper agencies. To permit any stockholder to institute an action in the corporate name to redress an alleged corporate wrong without a showing on his part that every reasonable effort had been made through the proper channels to induce corporate action, and that unredressed wrong would result to the corporation unless he were permitted to sue, would be to tolerate a practice prejudicial to corporations and other stockholders, and one violating all established precedents. In *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46, a stockholder sued in behalf of himself and other stockholders, similarly situated, to redress a wrong sustained through an alleged misappropriation of corporate assets. Relief was denied, the ground therefor being that he had made no effort through the stockholders of the corporation to have a suit to redress the wrong brought by the corporation. In the course of the opinion it is said:

“The vast and increasing importance of the business transacted by corporations and the immense number of stockholders in many of these companies, require that the court should closely scrutinize actions brought by stockholders where the cause of action is primarily one belonging to the company. If it be once conceded that such companies may be embarrassed and subjected to cost and expense by every stockholder who thinks he has a grievance, the usefulness of corporations would be seriously crippled.”

Therein it is further said:

“Among other requisites of a bill of this nature, in addition to the grievances which would warrant this kind of relief to the company, it was held that before the shareholder could be allowed to conduct a

litigation he should satisfactorily show that he had exhausted all the means within his reach to obtain, within the corporation itself, redress of his grievances. In addition to making an earnest effort to induce the managing body of the corporation to seek relief, he must further show, if he fails with the directors, that he has made an honest effort to obtain relief through the stockholders as a body, if time permits or has permitted him to do so. And if this be not done he must show cause why it could not be done or that it would be unreasonable to require it."—See also *Hawes v. Oakland*, 104 U. S. 450; *Jones v. Pearl Mining Co.*, 20 Colo. 421, 38 Pac. 766; *Beshoar v. Chappell*, 6 Colo. App. 323, 332, 40 Pac. 244; *Peoples Savings Bank v. Mining Exchange Bldg. Co.*, 8 Colo. App. 354, 356, 46 Pac. 620; *Hutton v. Bancroft & Sons Co.*, 83 Fed. 17.

The plaintiff alleges as a reason for the violation of the above rule the following: That on May 29, 1896, a suit was instituted in the district court of Arapahoe county, Colorado, by the above Fred G. Bulkley and the trustee in the above trust deed, Frank Bulkley, against The Tabor Mines and Mills Company and the directors thereof, praying an order enjoining the defendants therein from bringing any action against Fred G. Bulkley or Frank Bulkley to prevent a sale under said trust deed, and that a temporary writ of injunction was issued by last named court in accordance with said prayer, and "that owing to such injunction * * * served upon the first day of June, still in force, * * * neither the company nor its board of directors can * * * prosecute any suit to prevent the sale of this property which is advertised for the 15th inst." The pendency of such suit in the district court of Arapahoe county, and the issuance of the injunction therein is no reason for permitting the stockholder plaintiff

to maintain the present action, but is a further reason why the present action should be dismissed. It is not alleged that any collusion existed between the directors and the plaintiffs in the injunction suit. It is not alleged that the directors have not taken or will not take steps to obtain a dissolution of the injunction therein. So far as we are advised by the pleadings no reason existed why the directors would not contest such writ of injunction. We cannot presume that the directors in such suit would not attempt to obtain a dissolution of the injunction, and either in such action, or some other appropriate action, attempt to secure the relief here sought by plaintiff. Further, the writ of injunction issued by the district court of Arapahoe county was as effective against this plaintiff as a stockholder, as it was against the corporation.

“Whilst, as hereafter seen, the stockholder is denied the privilege of appearing and contesting the merits of a suit against the corporation, although he may be ultimately liable in respect of the judgment therein rendered, yet when a judgment is rendered against the corporation it establishes, as conclusively as any judgment can establish, the matter in litigation, the liability of the corporation to pay the debt. Like any other judgment it may be impeached for fraud or for want of jurisdiction by a party entitled to question it, but it cannot be assailed collaterally by a stockholder for any other cause, when sought to be charged in respect of it. It is valid until reversed in a direct proceeding, and concludes the stockholder, who is in privity with the corporation.”—3 Thompson on Corporations, § 3392.

“When subscribing for his shares and entering into the organization, he undertakes the responsibility for the result of litigation in which the corporation becomes involved to which he is not a party, and has not been given an opportunity to defend personally.

He is then represented by officers who are not only authorized to take charge of all litigation, but whose duty it is so to do; and why should not those whom the officers represent be held privies in interest and concluded by the result in the absence of fraud and collusion? There would seem to be no middle ground on which to place a judgment against a corporation and if the stockholders are bound under any circumstances they must be under all. This is the common conclusion of nearly all of the courts although their reasons are not always the same."—*Holland v. Duluth Iron Co.*, 65 Minn. 324.

"Where a valid judgment is rendered against a corporation the stockholders are bound thereby in respect to corporate matters and such judgment is not open to collateral attack."—*Hawkins v. Glenn*, 131 U. S. 319, 329.

"A stockholder is so far an integral part of the corporation that in view of the law he is a privy to the proceedings touching the body of which he is a member."—*Id.*

"Where the company itself has already brought suit on a cause of action and has been defeated, a stockholder cannot bring suit on the same cause of action on behalf of the corporation when though the former case was decided in another state."—2 Cook on Corporations, § 784.

The issuance and service of the writ of injunction in the suit pending in the district court of Arapahoe county enjoining any procedure to question the trust deed involved herein bound the corporation and prevented it from bringing the present action and just as effectively so operated upon this plaintiff. To entertain the present suit would be to permit the district court of Pitkin county to violate through its procedure an injunction issued out of the district court of Arapahoe county in a matter wherein the

last mentioned court had jurisdiction of the subject-matter and the parties.

For reasons above stated we think the complaint herein failed to state a cause of action, and that the lower court was right in so holding. Its judgment should be affirmed. *Affirmed.*

[No. 2212.]

HARVEY V. THE MOUNTAIN PRIDE GOLD MINING COMPANY.

1. Negligence—Master and Servant—Assumption of Risk.

An employee assumes all the risks incident to his service which arise from defects or imperfections in the thing about which he is employed of which he had knowledge or means of knowledge equal to that of his employer.

2. Same—Mines and Mining.

The workings of defendant's mine consisted of a tunnel connecting with a shaft so that a draft of air passed into the tunnel and out at the shaft. A bunk house was situated at the mouth of the tunnel consisting of a small building on each side, the space between being roofed over and forming the entrance to the tunnel. No special means were provided for extinguishing or checking fire. A fire occurred in the bunk house and was communicated to the timbers in the tunnel and caused the death of plaintiff's husband who was at work in the shaft. Deceased had experience in the work about mines and had been in defendant's employ one month sleeping in the bunk house, and never made any complaint as to the dangerous condition of the mine, and defendant had made no promise in reference thereto. Held, that deceased assumed the risk arising from the location of the bunk house at the mouth of the tunnel and plaintiff was not entitled to recover from defendant damages for the death of her husband.

Appeal from the District Court of Summit County.

Messrs. BELFORD & BELFORD, for appellant.

Mr. HERBERT R. BELFORD, of counsel.

Mr. H. RIDDELL, for appellee.

GUNTER, J.

18	234
20	311
34	232

13	234
358	273

Action by the surviving wife to recover damages for death of the husband through alleged negligence of defendant. Trial to the court. Judgment for defendant. Plaintiff appeals. The facts are undisputed. Defendant was operating a mine. Its workings were a tunnel 700 feet in length, and a shaft which connected with the tunnel at a depth in the shaft of 147 feet from the surface and continued below the tunnel level 30 feet; thence downward on an incline to a depth below the tunnel level 350 feet. Over the mouth of the shaft was a building containing hoisting, pumping and other machinery commonly used in mining. The shaft was partitioned, on one side being the ladder-way, and on the other the bucket-way. Two small wooden buildings used as bunk-houses stood at the mouth of the tunnel, one on each side thereof, the space between them being roofed, and being the entrance to the tunnel. There were no special appliances for extinguishing fire, nor was there a bulkhead or other means specially designed for checking fires. Malcolm T. Harvey, the husband of appellant, was in the employ of defendant as a pumpman, and at the time of the accident was at work with a fellow employee, Thomas Harvey, in the incline shaft about 250 feet below the tunnel level. Through the negligence of a fellow employee a fire started in the bunk-house and soon extended to the timbers of the tunnel, the draft carried the smoke through the tunnel and up the shaft. A fellow employee, Williams, working in the shaft about 220 feet above deceased informed the Harveys of the fire and all attempted an escape. When Williams reached the tunnel level he informed the Harveys—then some thirty feet below—that it was the bunk-house on fire, and that he was going to escape by the ladder through the shaft. Thomas Harvey said to await the bucket (with intent to escape by the bucket through the

shaft) and one of the Harveys rang the bell for that purpose. Williams escaped. The bucket was lowered as promptly as possible, but not in time to assist the Harveys, they were later found dead in the tunnel.

Plaintiff contends that defendant was negligent; that such negligence was the proximate cause of the death of her husband, and that such negligence consisted in the character and location of the bunk-house, and in the absence of a bulkhead or other means of checking the fire.

Defendant denies negligence and further says, that deceased had full knowledge of the conditions constituting the alleged negligence, that he was as capable of understanding them as defendant, the principal; that he made no complaint thereof and continued to work knowing such conditions without any promise of a change therein from defendant, and thereby assumed the risk of the results of the alleged negligence of defendant. Deceased, 36 years of age, was of good intelligence, had worked around mines before his employment by defendant, and had worked as pumpman in above mine during one month next preceding the accident. He lodged in the bunk-house, knew the materials of which it was constructed, its location and its use. In going to and from his work he traveled through the tunnel, knew its location with reference to the shaft and must have known of the draft passing through the tunnel and up the shaft. He also knew whether any appliances for checking the fire existed in and about the tunnel; the whole situation was as open to his observation as to that of the principal, and only common knowledge was required to understand it.

It is not attempted to be shown that deceased made any complaint to appellee of any danger in the situation, or that defendant made any promise to remedy the alleged defects.

The Denver Tramway Co. v. Nesbit, 22 Colo. 408, 45 Pac. 405, was an action to recover damages for personal injuries caused by defendant's alleged negligence, resulting in a verdict and judgment for plaintiff in the court below, and a reversal on appeal. The material facts were: September 24 plaintiff Nesbit was employed by The Denver Tramway Company as conductor on its street cars; October 17 he had charge of a train consisting of motor and trail car, and was operating the same upon the line. On the third trip, while the train was in rapid motion, in attempting to pass from the motor to the trail car he fell to the ground and the hind wheel of the train passed over his foot and ankle causing the injury involved. The negligence charged against the company as the proximate cause of the injury was the failure to have what is termed a "life guard" or "fender" which extends around from the front to the rear, from six to nine inches outside the wheels, and so near the ground as to prevent a person's foot from passing under and onto the track. The court in reversing said:

"There was no fender or life guard on the trailer * * * and its absence or presence was open to observation and easily discernible by the most casual inspection. Upon these conceded facts, we think it was the duty of the trial court to have withdrawn the case from the consideration of the jury and have determined, as a matter of law, that they were insufficient to show liability on the part of the company. * * * But, even conceding that the want of a life guard rendered the car defective and the company was guilty of a breach of its duty in failing to supply it and in operating the train without it, such defect was certainly obvious, and one that the appellee could not have failed to observe if he had used his eyesight, and one that was as open and pat-

ent to him as to the company; and if danger was to be apprehended from the use of a car in that condition, that result was equally apparent to him. Under these circumstances he was precluded from recovering by the well-settled rule that an employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge equal to his employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby."

Wells et al. v. Coe, 9 Colo. 159, 11 Pac. 50, was an action to recover for personal injuries sustained through the alleged negligence of defendant. Coe was working in a mine and killed by a bucket used to hoist earth and water descending in the shaft wherein he was working. The proximate cause of the accident was the breaking of the brake rod and slackness of a tight belt forming a part of the hoisting apparatus. Verdict and judgment for plaintiff below. The case was reversed and in the course of the opinion the court said:

"Where injury is suffered by an employee, through defects in the machinery or appliances furnished by his employer and used in the business, if the employee knew, or had means of knowledge equal to that of his employer, concerning such defects, yet continued in the latter's service, he cannot recover; provided no inducement, such as a promise to cure the defect, and thus remove the danger, led him to re-

main. The means of knowledge possessed by agents in cases covered by the third general rule above named are, of course, those of the principal or employer. * * * The reason for this exception is self-evident. If, with knowledge, or with means of knowledge equal to his employer's, of defects in the machinery, the servant, without remonstrance, voluntarily continues in the service, a waiver of his claim for damages is said to have taken place, or his conduct is regarded as negligence contributing to the resulting injury."

Applying the law so announced to the facts in this case, even should we assume that the defendant was guilty of negligence—upon which no opinion is expressed—the evidence shows that plaintiff with knowledge, or the means of knowledge equal to that of his employer concerning the alleged condition of his working place, undertook his work and continued the same without any complaint on his part, or any promise upon his employer's part as to the alleged negligent condition, and thereby assumed the risk arising from the alleged negligence of the defendant. This being true, plaintiff was not entitled to recover herein, the decision of the trial court in so ruling was right and its judgment should be affirmed.

Affirmed.

[No. 2175.]

THE JOHNSTON-WOODBURY HAT COMPANY v.
LIGHTBODY.

1. Appellate Practice—Findings—Conflicting Evidence.

A finding of the trial court upon conflicting testimony which is not manifestly against the weight of the evidence and where there is sufficient evidence to support it, is conclusive on the appellate court.

2. Contracts—Employment by Year—Evidence—Custom.

In an action by a traveling salesman against a wholesale merchant for balance of his salary under a contract of employ-

ment "for a period of one year for the season commencing December 1st," where defendant contended that plaintiff had not worked out the entire year, evidence of the known custom of trade in that line of business was admissible to show what constituted the season for traveling salesmen and when such season ended.

Appeal from the District Court of Las Animas County.

Mr. JOHN J. HERRING, for appellant.

Mr. A. C. McCHESNEY, Mr. A. J. ABBOTT and Mr. JOHN A. GORDON, for appellee.

WILSON, P. J.

Plaintiff was employed by defendant, a wholesale mercantile company, as a travelling salesman under a verbal contract, "for a period of one year, for the season commencing December 1st, 1897." He brings this suit to recover a balance alleged to be due him on his salary. The defense is that plaintiff abandoned the contract without cause, about the 22d day of October, 1898, and thereafter failed, neglected and refused to render any services for or on behalf of defendant, as required by the contract. The controlling question involved is one of fact exclusively. This having been found against the defendant by the trial court, upon conflicting testimony, and the finding not being manifestly against the weight of the evidence, and there being sufficient to support it, this court under the usual rule must be concluded by it.

About the only question of law which it would appear could be raised by the defendant, is with reference to the admission of evidence on the part of the plaintiff to show when the season for the discharge of duties by the plaintiff as travelling salesman under the contract ended. Upon the ruling of the court in this respect, the defendant predicates

error, but we think its position cannot be maintained. In the first place, plaintiff alleged in his complaint that the contract of his employment was for a period of one year, for the season commencing December 1, 1897, and this allegation is expressly admitted by the defendant in its answer. It would seem that the words "for the season" were used, qualifying the words preceding it, "for a period of one year," and hence the testimony was admissible to explain what the words meant,—what constituted a season. Such evidence would be explanatory only, and not contradictory of the terms of an express contract. Even if the words "for the season" should have been omitted from the contract, the testimony as to what constituted the season under the known usage and custom of the trade might have been admissible under a general rule of evidence well established and specially recognized by this court.—*Bradbury & Co. v. Butler & Son*, 1 Colo App. 435. In that case it was said, "Parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages, by implication, into their agreements, if nothing is said to the contrary.—*Hostetter v. Park*, 137 U. S. 30."

Besides, all testimony in regard to the custom or usage of the trade, and explanatory of what was meant by the season, could be eliminated, and still the finding of the court should be sustained. Even if the admission of such testimony was error, it was error without prejudice, because there was some evidence showing that plaintiff actually did perform services in the line of his employment by the defendant during the month of November, 1898, which was the month in dispute.

For the reasons given, the judgment must be affirmed.

Affirmed.

GUNTER, J., not sitting.

[No. 2222.]

WEAVER ET AL. V. THE CANON SEWER COMPANY.

1. Cities and Towns—Franchises—Sewers—Statutory Construction.

Section 4403, subdivision 10, Mills' Ann. Stats., authorizing cities and towns to construct sewers, regulate their use and to make special assessments against adjacent lots and lands for the purpose of such construction, limits the powers of municipal corporations in relation to sewers to those expressed in said subdivision. An ordinance purporting to grant to a private person an exclusive right and privilege to construct and operate a system of sewers within the limits of a municipal corporation and to collect from all persons using the same a reasonable annual compensation for connecting therewith is absolutely void, and one constructing a sewer system under such ordinance cannot maintain an action against an inhabitant of the city for the use of the same.

2. Cities and Towns—Sewers—Invalid Ordinance—Pleading—Evidence.

In an action by a sewer company against an inhabitant of a town to recover compensation for the use of its sewer system, where plaintiff's ownership was denied and plaintiff relied upon an ordinance as the source of its title, defendant could avail himself of the invalidity of the ordinance in defense without having specially pleaded the same.

Appeal from the District Court of Fremont County.

Messrs. WALDO & DAWSON, for appellant.

Mr. Jos. H. MAUPIN, for appellee.

THOMSON, J.

On the 8th day of December, 1885, the board of trustees of the town of Canon City adopted an ordinance purporting to grant to Lyman Robison, his associates, successors and assigns, for twenty years, the exclusive right and privilege to construct, operate and maintain a system of sewers within the corporate limits of the town, for the use of its inhabitants, and to collect and receive from all persons using the same a reasonable annual compensation for connecting

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34	294

therewith, not exceeding \$50 per year for one lot. On the 8th day of April, 1891, Robison assigned all his right and interest under the ordinance to Edwin C. Gray; and, on the 5th day of May, 1891, these were assigned by Gray to Mary H. Cross. On the 1st day of September, 1892, Robison and a number of others executed a deed transferring all the rights, powers and interests acquired by them and their predecessors and assigns, under the ordinance to The Canon Sewer Company, a corporation. Among the names subscribed to the deed does not appear that of Edwin C. Gray or Mary H. Cross. On the 13th day of April, 1899, The Canon Sewer Company brought this suit against J. E. Weaver and E. D. Bond, alleging that it was the owner of a sewer system in Canon City; that the defendants were the owners of a part of lot 10, in block 10, with the building thereon; that the building had, since January 1, 1896, been connected with the plaintiff's sewer system; and that a reasonable compensation for their use of the system was \$7 per year. Judgment for \$21 was demanded.

Except as to the incorporation of the plaintiff, and the defendants' ownership of the ground and building, the answer denied all the allegations of the complaint.

On the assumption that the ordinance was effective, the evidence leaves us very much in the dark respecting the plaintiff's title. It certainly did not succeed to the rights of Robison, for he had previously transferred them; no relinquishment from the person or persons holding his title was shown; and the claim that the subscribers to the deed were his associates seems a little shadowy. Neither does it very clearly appear what sewer was built pursuant to the ordinance. It seems that a sewer was constructed for the use of the penitentiary,

by the penitentiary authorities, from the penitentiary to the Arkansas River, over a right of way granted to them by the town, for the construction of which Robison and others furnished certain material, and with which they were allowed the privilege of making connections. This was known as the main sewer. It also appears that a sewer was constructed along the alley running through block 10, which discharged itself into the main sewer. With this sewer in the alley Robison had nothing to do; but it was the one with which the defendants had connected. It is not evident who was responsible for its existence; and we discover no facts upon which its ownership in the associates of Robison can with any certainty be predicated. The main sewer constructed by the penitentiary authorities, and this sewer in block 10, the history of which is somewhat obscure, seem to have constituted the entire sewer system to which the plaintiff claims title. From the disjointed and unsatisfactory evidence before us, we should find considerable difficulty in working out a judgment for the plaintiff, even if, otherwise, the way were clear to a recovery.

But aside from the doubtful character, in such respects, of the plaintiff's proofs, there is a fatal objection to its case. It relied upon the ordinance as the source of its title; but the grant which was attempted by the ordinance, was not within the power of the municipality. In the act concerning towns and cities, the powers of municipal corporations are enumerated and defined. Among other powers is that to construct sewers, regulate their use, and, for the purpose of their construction, to make special assessments against adjacent lots and lands.—Mills' Ann. Stats., sec. 4403, subdiv. 10.

With respect to the case before us, the limits of the powers of municipal corporations in relation to

sewers are defined in the foregoing subdivision. It was said by Chief Justice Field in *Zottman v. San Francisco*, 20 Calif. 96, that the rule is general, and applies to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by the charter, the mode must be followed. This utterance was referred to with approval by our own supreme court in *Keese v. Denver*, 10 Colo. 112, in which case it was held that where the statute has prescribed how the municipality may act, it has no power to act in any other or different manner. The same doctrine is announced by Judge Dillon, who says further that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.—1 Dillon Munc. Corp. § 96; see also 1 Beach Pub. Corp. 542.

The statute to which we have referred empowers municipal corporations to construct sewers, and to regulate their use; and provides a method by which the cost of their construction may be defrayed. Ownership and control, except in the municipality, would be inconsistent with its terms. The ordinance in question undertook to convert the sewer system of Canon City into private property, and vest the power conferred by law upon the town authorities, in individuals. It did more: it assumed to confer a power upon those individuals which it did not possess itself, namely, to charge and collect annual rental for the use of the system. In the absence of statutory authority, it was powerless to turn the construction, maintenance and control of its sewers over to private parties. Further, there is no provision by which it might compel the payment to it by its citizens of compensation for the privilege of

using its sewers; and, even if it might delegate powers which it actually possessed, it could not create a power. What it did not have, it could not give. In our opinion the ordinance was an absolute nullity, and no right or interest of any kind was acquired under it.

But for the plaintiff it is said that the defense of the invalidity of the ordinance should have been specially pleaded. We cannot assent to the proposition. The plaintiff alleged ownership of the sewers. The denial of ownership rendered it incumbent upon the plaintiff to prove facts from which ownership would result. It compelled the plaintiff, in order to entitle it to a recovery, to establish its title. It sought to do this by introducing an ordinance which on its face was void, and from which no title could be deduced. Relying solely upon that ordinance as the source of its title, it failed in its proof. The denial of title involved a denial of all the elements of title; and while, if the ordinance had possessed apparent validity, and facts *aliunde* were relied upon to show its invalidity, it might have been necessary to plead them, yet being on its face no evidence of title, as against the denial it was without effect.—See *Israel v. Day*, 17 Colo. App. 200, 68 Pac. 122.

The judgment will be reversed and remanded with instruction to dismiss the suit. *Reversed.*

[No. 2205.]

LEMOND V. HARRISON ET AL.

Life Insurance—Fraud—Action for Premium — Counterclaim—
Estoppel.

Plaintiffs as insurance agents contracted with defendant to furnish defendant a certain specified kind of policy of insurance and for the first year's premium defendant executed two promissory notes due at different times. When the policy was delivered one of the plaintiffs pretended to read to defendant a part of it

which indicated that it was in accordance with the agreement and told defendant that such was the case. Relying upon plaintiff's representations defendant paid the first note and laid the policy away without reading. In an action by plaintiffs on the second note nine months after the delivery of the policy, defendant pleaded fraud practiced upon him in delivering to him a different policy than that represented and set up a counterclaim for the sum paid on the first note. Held, that plaintiffs were not entitled to set up in defense of their own wrong that defendant was estopped to object to the policy because of his negligence in not objecting thereto for an unreasonable length of time, and it was error to dismiss defendant's counterclaim on that ground.

Appeal from the District Court of Arapahoe County.

MESSRS. PATTERSON, RICHARDSON & HAWKINS, for appellant.

MESSRS. GOUDY & TWITCHELL and Mr. C. H. REDMOND, for appellees.

WILSON, P. J.

Plaintiffs as agents for the Penn Mutual Life Insurance Company contracted with the defendant to have issued to him by that company a certain specified kind of policy of insurance upon his life, and he agreed to accept it and to pay therefor a certain stipulated annual premium for the period of twenty years. To cover the payment of premium for the first year, defendant executed and delivered his two several promissory notes, each for one-half of the premium, both payable to plaintiffs, and maturing at different dates during the year. Shortly subsequent, Mr. Harrison of the firm, one of plaintiffs, delivered a policy to defendant, and at the time of doing so, read to him or pretended to read to him a part of it which indicated that it was in accordance with their agreements, and also told him that such was the case. Relying upon this, defendant laid the policy away without reading it. The first pre-

mium note becoming due, was promptly paid by the defendant. Before maturity of the second note, defendant discovered that the policy was different in material respects from that for which he had contracted, and from that it was represented to be at the time of its delivery. Thereupon, taking the policy, he went to see the plaintiffs and insisted that the matter should be fixed up, and a policy issued to him in accordance with the agreement. Plaintiffs assured him that it would be all right, at various interviews had between the parties during several weeks after the discovery. It was finally agreed that the matter should be adjusted by the issuance to defendant of another policy for a similar amount, in lieu of the one received, and the premium on which would be less, but this was never issued. The second note maturing, pending these negotiations, payment was demanded through a bank, and being refused, plaintiffs instituted this suit. Defendant in answer pleaded the fraud which had been practiced upon him by the plaintiffs. He also set up a counterclaim, asking for the recovery of the sum paid by him in liquidation of the first note. The execution and delivery of the note being admitted, the defendant on trial was allowed the opening and closing. At the conclusion of the testimony offered in his behalf, the court on motion of plaintiffs granted a nonsuit as to the counterclaim of defendant, and as to the suit upon the note, directed the jury to return a verdict in favor of plaintiffs for the full amount thereof. The facts which we have stated we gather from the evidence on behalf of the defendant, which of course for the purposes of plaintiffs' motion, was admitted to be true. The action of the court was specifically based upon the ground that defendant was estopped from setting up the defense attempted, because of his negligence for an unreasonable length of time—nine

months—in objecting to the policy. It held in effect that it was the duty of the defendant, the contract having been reduced to writing, to have read it at the time of its delivery, or to have been reasonably diligent in doing so, and making his objections thereto if any existed. Whilst as a general proposition of law the court was correct, it seems equally clear to us that under the circumstances of this case, it was in error. We think that it does not lie within the mouths of plaintiffs to set up this defense to their own wrong. It was, according to the evidence, their wrongful reading of the policy and misrepresentations at the time of delivery which induced the defendant not to read it.—*Brooks et al. v. Matthews*, (Ga.) 3 S. E. 627; *Barnes v. Ins. Co.*, 75 Iowa 12.

If this suit were between the insurance company and the defendant, the case might present a different phase. Plaintiffs, however, being the agents who effected the insurance, and the parties who, it is alleged, perpetrated the fraud, cannot thus be allowed, we think beyond question, to defend against their own wrong.

Counsel for plaintiffs practically conceded in argument that the learned trial judge stated the law too broadly as applicable to the circumstances of this case, but urges that the judgment is correct on other grounds, and therefore should be maintained although the reasoning of the court in support of it may have been wrong. It is true that it is within the province of appellate courts to so act in such cases.—*Ins. Co. v. Railroad Co.*, 19 Colo. 48.

It by no means so clearly appears in this case, if at all, that the judgment ought to be sustained upon any of the grounds covered by the motion of plaintiffs, as to justify this court in the exercise of this discretionary power. It rather appears to us from the record here presented that the cause of justice would

be better subserved by reversing the judgment and remanding the cause to the district court for a new trial, when these questions can be specifically raised and argued by counsel, and passed upon by the trial court.

The judgment will be reversed.

Reversed.

[No. 2199.]

BUCK V. JONES.

Corporations—Liability of Stockholders—Mining Claims—Failure to Discover Mineral—Exchange for Capital Stock.

Where the locator of certain mining claims on which no discovery of mineral had been made transferred the claims to a corporation in exchange for the paid up capital stock of the corporation, the locator having acquired no right to the claims could convey none to the corporation, and having transferred nothing of value to the corporation in exchange for the capital stock received by him, he was liable for the debts of the corporation to the amount of the value at which said claims were received by the corporation.

Appeal from the County Court of El Paso County.

Messrs. TIFFANY, HAMILTON & WOODWORTH, for appellant.

Mr. GEORGE W. MUSSER, for appellee.

THOMSON, J.

The appellant brought this action against two of the stockholders of The Golden Horn Mining and Milling Company, a corporation organized pursuant to the laws of this state, to recover the amount of a judgment previously rendered in his favor against the company. The complaint alleged that the capital stock of the company was fixed by its certificate of incorporation at \$1,250,000, divided into 1,250,000 shares of the par value of one dollar each; that the defendant, Jones, was, at the date of the incorporation, the owner of three mining claims in the Cripple

Creek mining district, in this state; that shortly after the incorporation of the company, a certificate embracing its entire capital stock, full-paid and non-assessable, was issued and delivered to Jones in consideration of the conveyance by him to the company of the three mining claims of which he was the owner; that he immediately transferred 400,000 shares of the stock to the company, to be by it sold as fully paid, and, excepting 112,750 shares which he retained, divided the residue among the other incorporators and parties not named; that the mining claims were simple locations on which no work had been performed except that necessary to their location, and in which no mineral had been discovered; that they had no value except as prospects, and were not worth to exceed \$1,000; that the defendant Jones paid no consideration for his stock, and was liable to the creditors of the corporation for the difference between its par value and the value of the mining claims; that the other defendant paid no consideration for his stock, and was liable to the creditors of the corporation for its full par value; that for three years before the commencement of the action, no assessment work was done on any of the claims, and by reason of the default, the company lost all its rights to the property, and, having no other property, became insolvent; and that on the 18th day of June, 1898, the plaintiff recovered judgment against the company for \$300 and costs, execution on which was returned unsatisfied for want of property on which to levy. Judgment against the defendants for \$310.25 was demanded.

The only one of the defendants appearing to the action was Jones; and he demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sus-

tained, judgment entered accordingly, and the plaintiff appealed.

Our statute concerning corporations provides that each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him.—Mills' Ann. Stats., sec. 486.

It provides further that any mining company, organized under its provisions, may, for the purpose of purchasing mining property, issue full-paid stock in payment for it.—Mills' Ann. Stats., sec. 582.

The intention of the law is that stock issued by a corporation shall represent value. Persons transacting business with it have a right to rely on its representations; and, to hold itself out as having resources for the discharge of its liabilities which it does not possess, is a fraud upon its creditors. In the case of corporations organized under the laws of this state for the development of mining property, the capitalization may be, and usually is, fixed with reference to prospective value, that is, to value which in the judgment of the parties the property actually has, but which development is necessary to disclose; and if such value is estimated in good faith, we think the stock issued in consideration of a transfer of the property should be regarded as full paid, notwithstanding the parties' judgment should afterwards prove to be erroneous.

But we are informed by this complaint that no mineral had been discovered upon the claims which the defendant transferred to The Golden Horn Mining and Milling Company, and that, excepting those claims, the company had no property. The location of a mining claim must be made on a mineral vein or lode.—General Statutes U. S., sec. 2322.

The discovery of the vein or lode is an essential

prerequisite to a location. There is no valid location without it.—Mills' Ann. Stats., sec. 3152.

According to this complaint the defendant received stock in consideration of property to which he had no title. Having made no discovery upon the ground, he acquired no right in it, and his deed to the company conveyed nothing. By reason of his want of title, any valuation of the property for the purpose of its transfer by him to the company in consideration of stock was an over-valuation. The case made by the complaint, if established by proof, entitled the plaintiff to the judgment he sought, and it was error to sustain the demurrer. Let the judgment be reversed. *Reversed.*

[No. 2203.]

THE COLORADO TRADING AND TRANSFER COMPANY V.
THE ACRES COMMISSION COMPANY.

Fraud—Transfer of Property to Corporation—Possession—Attachment—Innocent Purchaser—Preferred Creditor.

Where a partnership which was indebted to a greater amount than the value of its assets organized a corporation to which the firm transferred its assets, there being no apparent change in the conduct and management of the business, the same member of the old firm who had charge prior to transfer to the corporation having charge afterwards, the transfer was in fraud of creditors and the property transferred was subject to attachment as the property of the old partnership. And a creditor of the old firm who assisted in the organization of the corporation and purchased a half interest therein with full knowledge of the facts was not an innocent purchaser, neither was he entitled to protection as a preferred creditor.

Appeal from the County Court of Teller County.

Mr. CHAS. D. GURNEY, for appellant.

WILSON, P. J.

The evidence discloses the following state of facts. On December 13, 1898, Walter H. Acres, Aus-

tin E. Acres and W. J. Bainard, as copartners, were and for some time previous had been engaged under the firm name and style of The Acres-Bainard Commission Company, in carrying on a general wholesale and retail hay, grain, flour, feed, produce and fuel business in the Cripple Creek mining district, at the town of Victor; that on said day this firm was indebted to the appellant company in the sum of \$900.00, and to one G. E. Ady, who was engaged in a similar business at the city of Denver in the sum of \$1,055.00, making a total indebtedness by the firm of \$1,955.00. That on said day the assets of the firm, consisting principally of office furniture and fixtures, and horses and wagons used in carrying on the business, were valued by the firm at about \$1,400.00, but the court in the trial of this suit found the value to be only \$650.00. On said December 13, the members of the firm, in connection with a Mr. Hulkill who was the agent and representative of the creditor Ady, organized a corporation to be known as The Acres Commission Company, the articles of incorporation being signed by Hulkill and the two Acres; and to this corporation the commission company conveyed its property by bill of sale of date December 14. This corporation was formed and the property of the old firm transferred to it at the suggestion of the creditor Ady, he proposing to take a half interest in it. Contemporaneous with this, on the same day, The Acres-Bainard Commission Company gave Mr. Ady its check or draft on a bank for \$1,000.00, which is claimed to have been in part payment of its indebtedness to him, and at the same time Mr. Ady gave to the commission company his personal check or draft on a bank for \$1,000.00, which it is claimed was in payment for a one-half interest in the corporation. As, however, this amount exceeded the inventoried value of the one-half of the property

of the corporation by \$300.00, the members of The Acres Commission Company gave to him their notes for \$300.00. The balance of \$55.00 on the Ady debt was subsequently paid in some other way, it is claimed. During all of this time Mr. Ady had full knowledge of the indebtedness to appellant by The Acres-Bainard Commission Company. There was no apparent change in the conduct and management of the business. The same Mr. Acres who had the charge and management of it prior to the incorporation, had the same afterwards. Subsequently, the appellant commenced suit on its account against the parties composing the firm of The Acres-Bainard Commission Company, and seized under writ of attachment a part of the property formerly belonging to the firm and transferred by it to the corporation. Thereupon the corporation intervened, claiming ownership of the property attached, and judgment being in its favor, the appellant appeals. There is no conflict of evidence as to the facts upon which the question presented on this appeal depend. The testimony discloses no dispute between the parties except as to the value of the property. The usual rule, therefore, which precludes this court from reviewing the findings of the trial court upon questions of fact, unless manifestly against the evidence, does not prevail.

It seems clear to us from the facts presented that the attempted transfer of the property to the corporation was without consideration and voluntary, and the commission company being at the time clearly insolvent, was a fraud upon its creditors. This being the case, the appellant creditor had a right to treat the pretended transfer as a nullity, and to proceed against the property as he did by attachment. It is not pretended that there was any consideration for the transfer, moving from the corporation. Mr. Ady knew at the time that the firm was insolvent and

January Term, 1903.

[No. 2219.]

MARSELIS V. THE PEOPLE FOR THE USE OF ISABELLA M. BUTTER.

1. Divorce and Alimony—Ne Exeat Bond—Action Upon Bond—Parties.

Where in a suit for divorce and alimony by a wife against her husband a writ of ne exeat was issued against the defendant and he entered into bond, payable to the people, conditioned that he would not leave the jurisdiction of the court without leave of the court, an action upon the bond for breach of its condition was properly brought in the name of the people for the use and benefit of the wife.

2. Same—Pleading.

In an action upon a ne exeat bond an objection to the complaint that it does not definitely appear whether the principal in the bond left the jurisdiction before or after judgment was recovered against him in the action in which the writ of ne exeat was issued should be raised by motion and not by demurrer.

3. Ne Exeat Bond—Action Upon—Breach of Condition.

In an action upon a ne exeat bond for breach of the condition that the principal obligor, who was defendant in a suit for divorce and alimony would not leave the jurisdiction of the court without leave of the court, it is immaterial whether he left before or after judgment was rendered against him in the divorce suit, if he left without leave of court.

Appeal from the District Court of Arapahoe County.

Messrs. WARD & WARD, for appellant.

Mr. HORACE G. BENSON and Mr. DEWITT C. WEBBER, for appellee.

THOMSON, J.

In a suit brought by Isabella M. Butter against

her husband, John Butter, for divorce and alimony, and upon her application, a writ of *ne exeat* was issued against the defendant, by which the sheriff was commanded to commit him to the county jail unless he should give sufficient security in the sum of \$500 that he would not leave the state, or go beyond the jurisdiction of the court, without the leave of the court. Adam A. Marselis thereupon became surety for the defendant in a *ne exeat* bond in the penal sum of \$500 payable to the people of the state of Colorado, and conditioned as required by the writ. Afterwards, without leave of the court, John Butter left the state of Colorado, and has not since returned. Isabella M. Butter recovered judgment against him for \$5,000.

This suit was brought against the surety in the name of the People of the state of Colorado, for the use and benefit of Isabella M. Butter, to recover the penalty of the bond. The complaint alleged the facts as we have given them. The defendant demurred to the complaint on the ground that it did not state a cause of action. The demurrer was overruled, and judgment given against the defendant, from which he appeals.

For the defendant it is contended, first, that the bond was taken for the protection of the sheriff and not for the use of Isabella M. Butter, and, hence, that a suit upon it for her use cannot be maintained; and, second, that it does not appear from the complaint but that John Butter left the state after the rendition of the judgment.

1. It is true that the bond was taken by the sheriff, and it is also true that the sheriff would have become liable for the amount of the judgment if he had failed to execute the writ, or, having arrested Butter, had suffered him to escape without giving the security; and under the practice existing

prior to the code, the bond should have been prosecuted by the sheriff.—*Brayton v. Smith*, 6 Paige Ch., 489.

But Mrs. Butter would have been the plaintiff in the suit to enforce the sheriff's liability; and the money collected by the sheriff on the bond, would have been payable to her. In *Johnson v. Clendinin*, 5 Gill & J. 463, it is said that the bail assume upon themselves the obligation that their principal shall pay the debt, or be personally amenable to the final process of the court. Our code of practice provides that, subject to certain exceptions of which this is not one, every action shall be prosecuted in the name of the real party in interest. As the proceeds of the *ne exeat* bond will belong to Mrs. Butter, we think she is the real party in interest within the meaning of the code, and that this suit was properly brought for her use.

2. We think that, although not clearly stated, it may be fairly inferred from the complaint that Mrs. Butter's judgment was recovered after her husband's departure from the state; and that the uncertainty of allegation was the subject of motion rather than demurrer. But the bond was not conditioned for Butter's appearance in court to answer any charge. His surety assumed the obligation that he would not go out of the state without leave of the court. No time was fixed after which, without lawful discharge, he was at liberty to depart. His presence within the jurisdiction of the court might have been as necessary after judgment as before, to the end that he might be reached by the final process issued upon the judgment. He could at any time have caused a discharge of the *ne exeat* to be entered by giving security for the payment of the judgment; but his departure without such discharge and without leave of the court, whether before or after judgment, was a breach of the

conditions of the bond. Formerly, in cases of alimony, the writ was not granted until after alimony had been decreed.—Story's Eq., § 1472. The rule is now otherwise; but the fact that it once prevailed, is a sufficient answer to the argument that, if Butter had not yet left, this security became inefficacious by the rendition of the decree.

The judgment will be affirmed. *Affirmed.*

[No. 2226.]

THE SMITH PREMIER TYPEWRITER COMPANY v.
STIDGER.

**Sale—False Representations—Transfer to Innocent Purchaser—
Replevin.**

Where a party obtained possession of a typewriter by false and fraudulent representations that he was agent for another party for whom he was making the purchase and after so obtaining possession sold it to an innocent purchaser, the party who obtained it by fraud acquired no title and conveyed none to the innocent purchaser, and the owner was entitled to recover the same from such innocent purchaser by replevin.

Appeal from the District Court of Arapahoe County.

Mr. W. W. DALE, for appellant.

Mr. C. H. PIERCE and Mr. GEO. S. REDD, for appellee.

GUNTER, J.

Replevin to recover typewriter and cabinet. At the close of plaintiff's evidence, judgment of nonsuit. Plaintiff appeals. Evidence for plaintiff was, that one Weaver obtained of it these articles, representing that he was purchasing as the agent of one McLaughlin; instructed them charged to McLaughlin, and stated that McLaughlin, in due time, would send a check in payment for them. Believing, and induced by the representations that

it was extending the credit to McLaughlin, and selling to him, the typewriter and cabinet were delivered to Weaver as the agent of McLaughlin. About one month thereafter plaintiff, discovering the fraud practiced, demanded their immediate return. Weaver stated he was doing some work, would like to use the machine a few days, and that if allowed to retain it for such time he would arrange the matter satisfactorily with plaintiff. Plaintiff replied the matter could be settled only one way, and that was by a return of the property, that unless this was made at once replevin would be instituted. The next day plaintiff's agent, having in charge this matter was called out of the city, returning in about five days. In the interval Weaver had sold to appellee, who, for the purpose of this opinion, we assume—without deciding—was an innocent purchaser. Plaintiff demanded possession of appellee, and upon refusal brought this action.

If by the above transaction the property in the typewriter and cabinet passed to Weaver then the judgment below should be affirmed, otherwise not. Plaintiff did not sell to Weaver; it agreed to sell to McLaughlin; but McLaughlin never bought of it. Plaintiff was induced to part with possession by reason of Weaver's false representations that McLaughlin was purchasing through him, Weaver. The agreement thus reached was void, not merely voidable. The property in the typewriter and cabinet never passed to Weaver, who, having no title, could pass none; therefore, the title of plaintiff was not affected by the sale of Weaver to appellee. Upon this showing plaintiff was entitled to recover.

In *Hamet v. Letcher*, 37 Ohio St. 356, Rohner, representing himself to be an agent of Letcher & Co., bought hogs of Hamet, paying only part of the purchase price, the vendor believing, and relying upon

his representations, that he was such agent. He was not the agent of Letcher & Co., nor had he authority to buy hogs on their account. Receiving the hogs under such circumstances he sold them to a party ignorant of the fraud by which they were obtained. The vendor recovered the value of the hogs of this purchaser; the court holding that the property in the hogs never passed to Rohner, that the agreement between him and the vendor was void.

In *Parker v. Dinsmore*, 72 Pa. St. 427, a party representing himself as the member of a firm, purchased wool in the name, and upon the credit of the firm. He thereafter sold to an innocent purchaser. The original vendor, Dinsmore, brought replevin against the purchaser, and recovered; the court holding that the title never passed from Dinsmore to the false agent, because possession of the wool was tortiously obtained without the owner's consent; and saying in the course of the opinion:

"But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it."

Weaver did not acquire the property in the typewriter and cabinet, he, therefore, did not pass ownership therein to appellee.

The judgment should be reversed.

Reversed.

[No. 2237.]

**ELDER, COUNTY TREASURER, AND THE CITY OF DENVER,
v. FOX ET AL.**

**1. Cities and Towns—Sewer Taxes—Failure to Record Tax Sales
—Estoppel.**

Where a special sewer tax was assessed against a city lot but no record thereof was made either in the office of the county treasurer or county clerk, and twelve years after such assess-

ment was made the city attempted to enforce its lien by causing said lot to be sold for said tax, the city was estopped to assert its tax lien as against a purchaser of the lot who purchased without notice of such tax and after an examination of the records for tax liens, and who received no notice of the tax or the tax sale until the purchaser at the tax sale applied for a deed upon his tax sale certificate. The holder of the tax sale certificate was not entitled to a deed and the tax lien and certificate should be annulled.

2. Cities and Towns—Sewer Taxes—Tax Sales—Caveat Emptor.

The rule of caveat emptor applies to a purchaser at an invalid tax sale of a city lot for delinquent sewer taxes and neither the purchaser nor his assignee of the tax sale certificate is entitled to recover from the city the amount due upon such certificate.

Appeal from the District Court of Arapahoe County.

Mr. J. M. ELLIS and Mr. N. B. BACHTELL, for appellants.

GUNTER, J.

A lot in the city of Denver was sold for a delinquent special sewer tax. The tax sale certificate issued under this sale was assigned to The United States Security and Bond Company, and by it to appellee Allen. The owner of the lot brought suit to annul the tax and the certificate, making the city, above company and the county treasurer defendants. The answer of appellee Allen while resisting the relief sought by plaintiff prayed judgment against the city—in the event the tax certificate should be cancelled—for the amount due to date of trial upon the certificate. The case was tried to the court, and judgment entered granting plaintiff the relief prayed, and in favor of appellee Allen against the city for the amount claimed in its answer upon the tax sale certificate. From this judgment the county treasurer and the city of Denver appealed.

No appearance here for appellees.

The facts pertinent to this ruling are: In 1880, the city of Denver established a sewer district and ordered the construction of a sewer. This was built April, 1882. The final estimate of the cost thereof, and the assessment list apportioning it to the lots, was approved by the city council. November, 1882, the city clerk certified the assessment list to the county clerk, who, December, 1882, delivered it to the county treasurer as a part of the assessment for taxes of the city for the year 1882. This in conformity with the then statute.—Session Laws 1879, p. 200, sec. 3; Gen. Laws Colo. 1877, p. 901, secs. 46, 47, 48.

In 1890 appellee Fox purchased the lot, the vendor thereof to pay all the tax liens by the same being deducted from the purchase price. Fox, by counsel, had the records in the offices of the county clerk and the county treasurer examined for tax liens. All taxes appearing delinquent were paid and a tax sale certificate cancelled. The amount so expended was deducted from the purchase price. There was no record of the sewer tax in question in the office of the county treasurer—where it should then have appeared—nor was any record of it found in the office of the county clerk. The grantee Fox relying upon this information that all taxes against the lot had been discharged, closed the purchase. Since which time he has continuously paid the taxes upon the lot and had no knowledge whatever of the tax in question, or of the sale at which the tax certificate was issued, or of the existence of this certificate until a treasurer's deed was being applied for about the time of the institution of the present suit, August, 1897. The tax certificate involved was issued December 5, 1894, by the county treasurer at a sale made of the lot for the above sewer tax.

Appellee Fox contends that under these facts the city of Denver is estopped from insisting upon the

existence of a lien for the tax in question, or the validity of the tax sale certificate. The purchaser of this property did all reasonably within his power to ascertain if this lien existed in favor of the city before making his purchase; through the negligence of the agents of the city he was led to believe, and did believe, that no such lien existed, and acted upon such reasonable belief in closing the purchase. Not until twelve years after the creation of the alleged tax lien does the city attempt to enforce it; and not until near fifteen years after the levy of the tax does the present owner of the lot know of the tax—this without fault on his part.

The doctrine of equitable estoppel applies to the claims of a municipality, and we think applicable to this case.

In *Board of County Commissioners of Arapahoe County v. City of Denver*, 30 Colo. 13, 69 Pac. 586, our supreme court said:

“The defense of equitable estoppel may be asserted against a municipal corporation when the character of the action and the facts and circumstances are such that justice and equity demand the corporation should be estopped.”

The following from Dillon Mun. Corp., 4th ed., section 675, is approved in *The John Mouat Lumber Company v. The City of Denver*, 21 Colo. 1, 8, 40, Pac. 237.

“The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the court to decide the question, not by the mere lapse of time, but upon all the circumstances

of the case to hold the public estopped or not, as right and justice may require.”

See also *City of Denver v. Girard*, 21 Colo. 447, 453, 42 Pac. 662; *Town of Fairplay v. Board of Commissioners of Park County*, 29 Colo. 57, 67 Pac. 52.

The decree wherein it annuls the lien of the sewer tax and the tax sale certificate is affirmed. Wherein it grants appellee Allen judgment against the city of Denver for the amount, principal, interest and penalty due upon the tax sale certificate is reversed. The rule of *caveat emptor* applies to the purchaser under the tax sale in this case, and also to the assignee of the tax sale certificate.—See *Richardson v. City of Denver*, 17 Colo. 398, 30 Pac. 333.

Judgment reversed.

Reversed.

[No. 2210.]

ENGEL ET AL. V. ATKINSON ET AL.

1. **Appeal from County to District Court—Defective Appeal Bond—New Bond.**

Where an appeal was prayed from the county to the district court by two joint defendants in a cause of which the district court had original jurisdiction, and the appeal bond was signed by only one of the defendants, upon motion to dismiss the appeal the district court properly allowed the defendants to file a new bond with the signatures of both defendants and denied the motion to dismiss.

2. **Same—Appearance—Waiver—Jurisdiction.**

In an appeal from the county to the district court of a cause wherein the district court had original jurisdiction where the appellees moved to dismiss the appeal because of a defective appeal bond which was denied and the appellees did not stand on their motion but proceeded to take part in the trial of the cause upon its merits, they thereby entered their general appearance and waived all irregularities in the manner of the appeal affecting the court's jurisdiction of their persons.

3. **Bills and Notes—Action Upon—Defense—Partnership.**

In an action upon a promissory note payable to E. & E., where it was alleged that E. & E. was a copartnership firm and that plaintiffs were the partners, an answer which denied that

plaintiffs composed the firm of E. & E. to whom the note was payable and denied their ownership and alleged that one S. E. was the sole member of the firm of E. & E. to whom the note was payable and was then the owner thereof, and which alleged a defense which would be good as against S. E. but which would not be good as against plaintiffs, stated a sufficient defense to the action.

Error to the District Court of Arapahoe County.

On Rehearing.

Mr. HENRY HOWARD, Jr., and Messrs. ALLEN & WEBSTER, for plaintiffs in error.

Mr. H. A. LINDSLEY, for defendants in error.

WILSON, P. J.

This suit was brought to recover balance due upon a promissory note. The note was signed by defendant E. A. Atkinson, and was endorsed by Mrs. A. Atkinson, but the complaint alleges facts which, it is claimed, made Mrs. Atkinson jointly liable and chargeable as a maker. The note was for the principal sum of \$150.00, with interest from date at the rate of five per cent. per month, and was payable to the order of Engel & Engel. The complaint alleged that the plaintiffs were at the time of the execution of the note and at all times mentioned copartners doing business as Engel & Engel. The defendants answered separately. Each admitted the execution of the note, but denied that the plaintiffs were then, or ever had been, the owners or holders of the note, and that they were or ever had been copartners doing business as Engel & Engel, and alleged the fact to be that one Samuel Engel was then and at all times had been the owner and holder of the note. As a further defense, Mrs. Atkinson alleged that she had paid on the note, after its maturity, to said Samuel Engel, the sum of \$40.00, and that this should be allowed as an additional credit

thereon. E. A. Atkinson also set up as a further defense that he was simply an accommodation maker for Mrs. Atkinson; that he had signed the note in blank, without date, amount or time of payment, and delivered the same to her with authority to fill in the blanks, making the amount \$150.00, due in thirty days from date, with interest at the rate of eight per cent. per annum; and that these facts were well known to Samuel Engel, at and before the time when he received the note and loaned the money to Mrs. Atkinson. He further set up as a defense that after the maturity of the note, and while he was the legal owner and holder thereof, the said Samuel Engel, with full knowledge that defendant was an accommodation maker and surety, for a valuable consideration extended the time of payment, without his knowledge or consent.

The case was originally commenced in the county court, and from thence appealed by defendants to the district court. On the day it was docketed in the district court the plaintiffs, appearing specially, moved the dismissal of the appeal on the ground that defendants had prayed a joint appeal, and that the appeal bond was signed by only one of them. Within forty-eight hours thereafter, the defendants presented a motion asking leave to file within a reasonable time to be fixed by the court, a good and sufficient bond. On hearing of both motions, the plaintiffs' motion to dismiss the appeal was denied, and the defendants were permitted to file an appeal bond signed by both, and in proper form. Plaintiffs assign this for error. The part of the statute applicable and under which the court acted reads as follows: "And provided further, that no appeal shall be dismissed on account of a defect or informality in the undertaking or the insufficiency thereof, if the appellant or appellants shall within a reasonable time

to be fixed by the court file a good and sufficient undertaking.'—Laws 1885, p. 159; Mills' Ann. Stats., sec. 1089.

The ruling of the court was not error.—*Wheeler v. Kuhns*, 9 Colo. 196.

There was here an attempted compliance with the requirement of the statute. There was not an entire failure to file a bond. Under the circumstances, the filing of a new bond was in the nature of an amendment—more so, indeed, than in the case of *Wheeler v. Kuhns*, *supra*. In that the party appealing had not signed the bond at all. Here one of the parties had signed it, but for some reason the other had failed to do so. The defendants promptly appearing, and asking leave to remedy the defect, it was not error to permit them to do so. The ruling came not only within the spirit and intent of the statute, but we think within its terms.

In the case above cited, Judge Helm, speaking for the court, said: "The approval by the court which tried the cause of the imperfect obligation given in good faith and the transmission thereof to the appellate tribunal, entitled appellant to the benefit of the corrective statute."

Conceding, however, that the case presented did not come within the terms of the corrective statute, and that the denial by the district court of the motion to dismiss was error, yet there is still another conclusive reason why it was not reversible error. It cannot be questioned that the district court had full jurisdiction of the subject-matter of the appeal. The regularity or irregularity of the appeal affected only the jurisdiction of the person. Appellees did not stand upon their motion to dismiss, but upon its denial proceeded to take part not only in one, but two subsequent trials of the cause on its merits. Thereby they entered their general appearance, and waived

all irregularities in the manner of the appeal affecting the court's jurisdiction of their persons.—*Las Animas County v. Stone & Goodale*, 11 Colo. App. 476; *Smith v. District Court*, 4 Colo. 238.

In the latter case the court said: "It was perfectly competent for the petitioners, after having interposed their motion to dismiss the appeal for want of jurisdiction, either before or after it was denied, to waive the objection."

There is a clear distinction upon principle and on authority between the effects of irregularities in appeals to courts having appellate jurisdiction only, and appeals to courts like the district court, which are vested not only with appellate jurisdiction, but also with original jurisdiction of the subject-matter.

The remaining assignments of error discussed by plaintiffs are substantially to the effect that the court erred in holding that the defense interposed by the defendants was sufficient, and in allowing the same to go to the jury, and rendering judgment upon the verdict rendered by the jury. We think the plaintiffs to some extent misapprehend the character of the defense. There was no attempt to assert that the payees named in the note were not the real parties in interest. It appeared upon the face of the note that Engel & Engel was the payee, and this was not denied. It was alleged that Engel & Engel was a firm, a copartnership, and that the plaintiffs herein were the partners. This was denied by the defendants, and it was further alleged by them that Engel & Engel was simply the name under which Samuel Engel did business, and that Samuel Engel at all times had been and was then the owner and holder of the note. Plaintiffs not claiming ownership by assignment, the vital question was, who was the payee—who was or were Engel & Engel. The answers therefore presented an issue important and material

to be determined, in view of the fact that they disclosed a defense which each of the defendants might have in the event that Samuel Engel was the owner and holder of the note, but which they would not have if the plaintiffs were the owners and holders. The great preponderance of evidence seemed in favor of the fact,—and the jury so found,—that Samuel Engel was the payee of the note, and that he was and at all times had been the owner and holder of it. A finding otherwise would have been equally decisive of the case, because in that event all defense to the action would have fallen.

The judgment was correct and will be affirmed.

Affirmed.

[No. 2241.]

TAYLOR V. INGERSOLL.

1. Chattel Mortgages—Contract to Pay Debts of Mortgagor—Evidence.

Where a merchant executed a chattel mortgage upon certain property in consideration of which the mortgagee assumed and promised to pay certain debts owed by mortgagor, the names of the creditors and the amounts owed to each, which the mortgagee assumed, being stated in the chattel mortgage, in an action by one of the creditors against the mortgagee for the amount stipulated and agreed to be paid to him, when plaintiff proved the contract in the chattel mortgage it was unnecessary to introduce further evidence to show that the mortgagor was indebted to plaintiff and the amount thereof and error committed in the admission of secondary evidence as to the amount of such indebtedness was not prejudicial.

2. Same—Acceptance.

Where in consideration of a chattel mortgage the mortgagee assumed and agreed to pay certain debts of the mortgagor, notice to the mortgagee by one of the creditors that he accepted the terms of the contract and a subsequent suit thereon was a sufficient acceptance by such creditor.

Appeal from the County Court of El Paso County.

Mr. G. W. MUSSEY and Mr. BERT LINN, for appellant.

Mr. H. G. LAING, for appellee.

GUNTER, J.

Myers Grocery Company was indebted to various parties; desirous of discharging these claims it gave a chattel mortgage upon certain of its assets to appellant Taylor, in consideration of his executing an instrument containing *inter alia* the following provision.

“Colorado Springs, Jany. 23, 1899. For value received I hereby * * * agree to pay within sixty days from this date, all those debts * * * of that certain firm * * * the Myers Grocery Company * * * shown on the attached statement, the amount assumed hereby being limited to the sums set opposite the respective names of said creditors, as shown on said attached statement.

“C. D. Taylor.”

After this section of the contract appeared the names of creditors, and, opposite the respective names, the definite amount due each, including the amount due appellee Ingersoll.

Appellant failing to pay the sum so agreed within the time fixed, appellee sued upon above contract, had judgment, and therefrom is this appeal.

Appellant contends that prejudicial error was committed by the trial court in admitting certain secondary evidence as to the amount owing by Myers Grocery Company to appellee. If error was so committed, it was without prejudice, because committed in establishing an immaterial fact. Plaintiff (appellee) proved the above contract, the consideration therefor, and thereby established the unconditional promise of defendant to pay to plaintiff the definite sum stated therein. By this agreement plaintiff

and defendant fixed the amount owing by Myers Grocery Company to plaintiff, and defendant agreed to pay that amount. There was no necessity for plaintiff, in making out his case, proving that Myers Grocery Company did owe him the amount which defendant, for a valuable consideration, had promised to pay him by above contract. The reception of the evidence complained of in no degree affected the result of the trial.

Defendant introduced no evidence. The court, as it should have done, instructed a verdict for the sum agreed to be paid plaintiff by above contract.

Appellant further contends, that the contract sued upon was not accepted by plaintiff. Plaintiff, by counsel, had the contract examined, and notified defendant promptly of its acceptance. This suit was also an acceptance of its terms.

Judgment should be affirmed.

Affirmed.

[No. 2242.]

THE MUTUAL BENEFIT ASSOCIATION v. NANCARROW.

1. Accident Insurance—Total Disability—Confinement to House.

An accident insurance policy promised to pay the insured a certain sum per week if he should be totally disabled and confined to the house. Held, that the total disability contemplated in the policy did not mean absolute helplessness, but that the insured was totally disabled within its meaning if he were entirely incapacitated for work or business, and the fact that he was able to go to his physician's office for treatment did not contradict the fact of his total disability. And he was confined to the house within the meaning of the policy when he was compelled to entirely withdraw from work or business, notwithstanding he was able and did occasionally leave his house and go to his physician's office.

2. Accident Insurance—Visits of Physician—Pleading.

Where an accident insurance policy promised to pay the insured a certain sum per week from the first to the last visit of the attending physician, a complaint which alleged that insured became sick on a certain day and was under the care of

a physician until a certain other day named was sufficient to admit proof of the dates of the physician's visits although plaintiff might have been required on motion to make his complaint more definite, and the fact that some of the visits took place at the physician's office instead of the plaintiff's home was immaterial.

3. Accident Insurance—Notice—Pleading.

Where a complaint on a policy of accident insurance on its face showed that a liability existed against defendant in favor of plaintiff and the complaint contained no averment of a condition of the policy prescribing the notice to be given to the defendant of the sickness of the insured or of a compliance with such condition, if the defendant desires to rely upon a breach of such condition to escape liability it must plead the condition.

Appeal from the District Court of Arapahoe County.

MR. FRANK S. TESCH, for appellant.

THOMSON, J.

The appellee brought this action against the appellant to recover upon a policy of insurance which it had issued to him. The complaint alleged that on the 24th day of January, 1898, the defendant, in consideration of certain payments to be made to it by the plaintiff, delivered to him its policy of insurance, whereby it insured him against accident, accidental death, and certain kinds of sickness, among which was acute pericarditis, and promised to pay the plaintiff \$8 per week from the first to the last visit of the attending physician, if the plaintiff should be totally disabled, and confined to the house; that the plaintiff made the payments required by the policy; that on the 24th day of January, 1899, the plaintiff became sick from acute pericarditis; became totally unable to attend to any business, and was under the care of a physician until April 18, 1899, a period of twelve weeks; that he was, during that time totally disabled, and was confined to the house, except that, on account of poverty, he visited his physician about

twelve times, there being a car line between his house and the physician's office; that he did all things necessary under the policy to entitle him to its benefits, and that the defendant wrongfully refused to pay the amount due him by the terms of the policy, being \$96.

The defendant demurred to the complaint for want of facts to constitute a cause of action; and, its demurrer being overruled, answered, admitting the execution and delivery of the policy and the making of the payments which it specified, but denying the other allegations of the complaint. It also alleged affirmatively that the plaintiff violated the conditions of the policy twelve different times during his sickness, by leaving his house and coming into Denver on the street cars.

When the plaintiff rested his case, the defendant moved the court for a nonsuit on the ground that the evidence showed that the plaintiff was not confined to the house. The motion was denied, and, the defendant offering no evidence, judgment was rendered against it for the amount claimed. It brings the case here by appeal.

In support of the demurrer it is argued that the complaint shows that the plaintiff was not totally disabled, and was not confined to the house, because it states that at different times he left the house and called upon his physician. The words "totally disabled," as well as the words "confined to the house," must receive a reasonable interpretation. The purpose of the policy was to indemnify the plaintiff against loss occasioned by inability to attend to his work or business on account of sickness. The total disability contemplated by the instrument, does not mean a state of absolute helplessness. The plaintiff might have been able to walk, he might have been able to ride on the cars to his physician's office, and

still have been entirely incapacitated for work or business. In view of the object of the contract, we think that if he was so incapacitated, he was totally disabled within the meaning of the policy.—See *Thayer v. Ins. Co.*, 68 N. H. 577.

Nor, applying the same rule, do we think that the words “confined to the house” were intended to mean a constant restraint within doors. One may be sick, and still be able to move about, and, on occasion, temporarily to pass to the outside. A complete and enforced withdrawal from business or work, was undoubtedly necessary under the policy; but exceptional and temporary absences from the house, are not inconsistent with the idea of a general confinement within it. The complaint says that the plaintiff was confined to the house, except at intervals, when he rode on the cars from his house to his physician’s office; and we think a sufficient confinement is alleged to answer the requirements of the policy.

It is also objected that, by the terms of the policy as stated in the complaint, the plaintiff was entitled to its benefits only during the time which elapsed between the first visit of the physician and the last, and the complaint does not give the date of either visit. But the complaint alleges that the plaintiff was under the care of a physician from the 24th day of January, to the 18th day of April, a period of twelve weeks. He could not have been under the care of a physician unless the physician saw him. While the plaintiff might have been required to make the allegation more explicit, it was sufficient, as it stood, to let in proof of the dates of the visits. And that a portion at least of the visits took place in the physician’s office instead of the plaintiff’s house, is immaterial. The plaintiff’s want of money sufficiently accounts for the fact that they occurred there.

It is also urged that the complaint fails to state

that the plaintiff complied with a condition attached to the policy prescribing the notice of the sickness to be given to the defendant. But the complaint did not set forth that condition; and it not appearing from the complaint that there was any such condition, it was unnecessary to allege compliance with it. On the face of the complaint, a liability existed in favor of the plaintiff and against the defendant; and if the defendant, to avoid the liability, proposed to rely on a breach of the condition, it was incumbent on it to plead the condition in its answer, together with the facts constituting the breach.—*Ins. Co. v. Allis Co.*, 11 Colo. App. 264. We think the demurrer was properly overruled.

The evidence supported in a general way the allegations of the complaint. It showed visits by the doctor at the house of the plaintiff, and consultations with the doctor at the latter's office. The dates testified to, and the other facts in evidence, corresponded with the statements in the plaintiff's pleading. The sole ground of the motion for a nonsuit was that the evidence showed that the plaintiff was not confined to the house. It showed just what the complaint alleged, that he remained within the house except when he went to the doctor's office. The argument upon this condition of fact has been already disposed of. The judgment will be affirmed. *Affirmed.*

[No. 2749.]

SCHAFFER V. HEGSTROM.

Forcible Entry and Detainer—Jurisdiction of Court of Appeals.

The court of appeals has jurisdiction to review on appeal final judgments of county courts in suits under the forcible entry and detainer act.

Appeal from the County Court of Arapahoe County.

Mr. W. W. GARWOOD, for appellant.

Mr. T. W. HOYT, for appellee.

WILSON, P. J.

This is an appeal taken from the judgment of a county court in a suit under the forcible entry and detainer act. Appellee moves to dismiss because of want of jurisdiction in this court over the subject-matter of the action. Prior to 1885, an appeal would not lie from a county court judgment in proceedings of this character, to the supreme court. Section 17 of the statute then in force provided that "Appeals and writs of error to the supreme court from the judgments of the district court, and writs of error to the judgment of any county court in proceedings of this character, shall be allowed as in other cases."—Gen. Stats., p. 505; *Brandenburg v. Reithman*, 7 Colo. 324.

At the legislative session of 1885, the entire forcible entry and detainer statute was amended and reenacted, and it was therein provided that "appeals and writs of error to the supreme court from the judgment of the district, county or superior courts of this state in proceedings under this act, shall be allowed as in other cases."—Laws 1885, p. 230, sec. 22; Mills' Ann. Stats., sec. 1992.

The evident intent and purpose of this section as amended was to invest the supreme court with jurisdiction of such cases on appeal. Therefore, the court could review judgments of county courts in proceedings under this statute only on error. Thereafter, it could review them on appeal. By legislative act, approved and taking effect April 6, 1891, the court of appeals was created, and it was invested with jurisdiction "to review the final judgments of inferior courts of record in all civil

cases, and in all criminal cases, not capital.”—Laws 1891, p. 119, sec. 4; 3 Mills’ Ann. Stats., sec. 1002d. In the third subdivision of the same section, it was provided that “Writs of error from, or appeals to the court of appeals shall lie to review final judgments within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the supreme court.”

It must be conceded, and appellee does not attempt to deny, that at this time by virtue of this statute this court had jurisdiction to review on appeal the final judgment of a county court in a suit arising under the forcible entry and detainer act. At this same session of the legislature, however, and on April 13, 1891, an act was passed and went into effect amending section 22 of the forcible entry and detainer statute, by substituting another section therefor.—Laws 1891, p. 228; 3 Mills’ Ann. Stats., sec. 1992. In this amended section, it was still provided that appeals and writs of error to the supreme court would lie, as under the statute before amendment, and it was not specifically provided that such appeals or writs of error would lie to the court of appeals,—this court was not named. By reason of this, the latest expression of the legislative intent, it is contended that this court is without jurisdiction. Appellee insists that the case as presented is identical with that of an action under the divorce act, in which it has been held, both by this court and by the supreme court, that this court was without jurisdiction to review the final judgment.—*Mercer v. Mercer*, 13 Colo. App. 237; *Mercer v. Mercer*, 27 Colo. 216.

We think counsel are in error in both contentions. The 1891 amendatory act of the forcible entry and detainer statute does not undertake to provide a different and complete form of procedure in such cases. That portion of it which provides for a review of the

judgment by an appellate court is not amendatory at all; it is in precisely the same language as was the old statute. The only amendment is by the addition of some provisions with reference to certain bonds which are required to be given on appeal. We can see no evidence whatever, and none has been pointed out to us, of a legislative intent to provide a new or complete system of procedure or to restrict the right of appeal in such cases to the supreme court. In proceedings under the divorce act, the facts were entirely different, and these differences are fully pointed out in the opinion of this court in the Mercer case. There, two years after the creation of this court, an act was passed specifically providing for a full and complete system of practice and procedure in relation to divorce and alimony, in many instances and materially different from the statutes in relation to these subjects theretofore in force, and repealing all existing acts in reference to them. Our decision which was fully concurred in by the supreme court, was based upon the rule that "wherever the legislature attempts to enact a statute covering subject-matter which has theretofore been the object of legislation and providing a complete system for it, we have a right to conclude that it was the legislative purpose to repeal all acts inconsistent with it." It is obvious that the present case does not come within this rule. In this case, in our opinion, there was no intent on the part of the legislature by its amendatory statute of 1891 to divest this court of the jurisdiction which had been conferred upon it to review on appeal final judgments of county courts in suits under the forcible entry and detainer act; and such jurisdiction is still vested in this court equally with the supreme court.

Counsel cite us to the opinion in *Reynolds v. Lar-*
kins, 10 Colo. 126, in which it was said: "The forc-

ible entry and detainer statute is, on the other hand, a separate and independent law, treating solely of the actions indicated by its title." This may be true, and yet by no means is it sufficient to deprive this court of appellate jurisdiction. Concede it to be a separate and independent law, and still if the proceeding under it be a civil action or case and the judgment rendered be final (neither of which propositions is or can be disputed), there can be no question under the statute creating this court of its jurisdiction to review such judgment, there being nothing in the act expressing or indicating a purpose or intent to the contrary.

The motion to dismiss the appeal will be denied.

Motion denied.

[No. 2235.]

THE UNITED OIL COMPANY v. ROSEBERRY.

Opinion Followed.

This case is affirmed on the opinion in the case of United Oil Co. v. Roseberry, 30 Colo. 177.

Appeal from the District Court of Fremont County.

Mr. HENRY F. MAY, for appellant.

Mr. J. G. WATERS and Mr. LEE CHAMPION, for appellee.

WILSON, P. J.

The plaintiff brought this suit to recover damages for personal injuries suffered by her through the alleged negligence of the defendant company in the demolition by a gas explosion of the house in which she and her family resided. Her husband, Benjamin S. Roseberry, was injured in the same accident, and in a suit for damages against this defendant recovered a judgment which upon appeal to the supreme court was recently affirmed.—*United Oil Company v. Roseberry*, 30 Colo. 177.

At the trial in the district court these two suits were consolidated and tried upon the same evidence, to the same jury, and at the same time. The record, therefore, in both cases is the same, and upon the authority of that decided by the supreme court, the judgment in this must be affirmed.

Such will be the order.

Affirmed.

[No. 2000.]

ALTMAN ET AL. V. HOFFMAN.

Appellate Practice—Exceptions—Assignment of Errors.

Errors assigned to the admission of evidence and to the final judgment will not be considered on review, where no exception was taken to the ruling of the court admitting the evidence nor to the judgment.

Appeal from the County Court of El Paso County.

Mr. CHAS. D. GURNEY, for appellants.

Mr. JNO. E. RINKER, for appellee.

THOMSON, J.

The appellee was plaintiff, and the appellants defendants, below. Error is assigned to the admission of evidence offered by the plaintiff, and to the final judgment. The defendants objected to the introduction of the evidence referred to; but it was received nevertheless, and they took no exception to the ruling; nor was there any exception to the judgment. By reason of the want of proper exceptions, the record presents no question for our determination.—*Wasson v. Dyer*, 3 Colo. 398; *Burnell v. Wachtel*, 4 Colo. App. 556; *Mining Co. v. Burbridge*, 11 Colo. App. 487.

The judgment is affirmed.

Affirmed.

[No. 2228.]

HART V. PEET.

Appellate Practice—Abstract of Record—Replevin—Chattel Mortgages.

On appeal from a judgment against the plaintiff in an action of replevin to recover possession of certain property under a chattel mortgage, where it appeared that the action was brought prior to the maturity of the note secured by the chattel mortgage and appellant's abstract contained neither the chattel mortgage, note or affidavit in replevin, nor anything showing what property was mentioned in the chattel mortgage or what condition had been broken, and in appellee's brief it was stated and not controverted by appellant that there was no evidence or contention in the trial court that any condition of the mortgage had been broken, also that it did not appear that the property in controversy was embraced in the mortgage or was the property of the mortgagor, the judgment must be affirmed.

Appeal from the County Court of Pueblo County.

Mr. W. B. McNEEL, for appellant.

Mr. H. P. VORIES, for appellee.

THOMSON, J.

We are informed by the brief of counsel for the appellant that this suit was commenced before a justice of the peace; that it was replevin for two rifles which the plaintiff—appellant here—claimed by virtue of a chattel mortgage securing a promissory note executed by the husband of the defendant, L. R. Peet; and that default having been made in the payment of the note, the plaintiff secured possession without suit of all the mortgaged property except the two rifles. No mortgage, note or affidavit in replevin, or in fact any part of the record, is found in the abstract furnished by the plaintiff. A supplemental abstract prepared for the defendant, sets forth a note dated September 15, 1897, for \$300, due six months after date, payable to Henry W. Hart, and signed L. R. Peet. We assume this to be the note referred to

in the brief for the plaintiff. This note by its terms matured on the 15th day of March, 1898. The appellant's abstract advises us that this suit was commenced on the 28th day of January, 1898. At that time the note had not matured, and no right of action had accrued to the plaintiff, unless by virtue of some special provision contained in the mortgage. But the plaintiff has not seen fit to lay that instrument before us, and we do not know what its provisions were. For the same reason we do not know whether two rifles, or any rifles, were mentioned in it; and, indeed, except by a statement in the plaintiff's brief, we are nowhere informed what property was the subject of this controversy.

Counsel for the appellee says in his brief that there was no evidence or contention in the trial court that any of the conditions of the mortgage had been broken. He says also that it did not appear that the articles taken by the writ were embraced in the mortgage, or were the property of the defendant's husband, L. R. Peet. In behalf of the appellant, neither of these statements is controverted. The failure to controvert admits them, and the admission disposes of the case.—See *Bartholemew v. Yankee*, 30 Colo. 361.

Let the judgment be affirmed.

Affirmed.

[No. 2196.]

McKEAN v. THE COLORADO FUEL AND IRON COMPANY.

1. Negligence—Master and Servant—Safe Place to Work—Delegation of Duty—Vice-Principal.

The master is bound to use reasonable care in providing for the safety of his servants. It is his duty to furnish safe and suitable appliances and keep them in proper condition for use. Knowledge of defects in the appliances to which danger is incident, is imputed to him if by the exercise of reasonable diligence he might have discovered and remedied them. And he

18	285
19	208
19	209

cannot escape liability for neglect of his duty by delegating its performance to an employee. By the delegation the employee, without regard to his rank or the grade of his employment, becomes a representative of the master, and his negligence is the master's negligence. But this rule does not apply to appliances which are not furnished by the master and which the law does not charge him with the duty of providing.

2. Same.

Plaintiff was an employee of defendant working in the second story of defendant's engineroom. A safe passageway or balcony was constructed entirely around the room of said second story but a part of the floor of said passageway had been removed for the purpose of letting certain machinery pass through. For convenience in passing from one side to the other of this opening and to save the trouble of walking around the room, some of defendant's employees placed a plank across the opening in the floor on which the employees were in the habit of crossing. Plaintiff in attempting to cross on said plank fell and was injured. Held, that plaintiff took upon himself the risk of crossing on said plank and defendant was not liable. And the fact that the foreman under whose direction plaintiff was working but who had nothing to do with the construction of the passageway had crossed on the plank and called to other employees to come on immediately before plaintiff attempted to cross did not relieve plaintiff of the duty to use the passageway constructed by defendant for his use nor charge defendant with responsibility for the danger connected with the use of the plank.

Appeal from the District Court of Arapahoe County.

Mr. TYSON S. DINES, Mr. W. D. REID and Mr. O. L. DINES, for appellant.

Messrs. DEVINE & DUBBS, Mr. JOHN M. WALDRON, Mr. D. C. BEAMAN and Mr. FRED HERRINGTON, for appellee.

THOMSON, J.

The appellant brought this suit against the appellee, in whose employ he was, to recover for injuries sustained by him while engaged in the performance of his duties, by reason, as alleged, of the negligent failure of the defendant to provide him with reason-

ably safe means for reaching the place of his work. The answer was a denial. Upon the evidence the court directed a verdict for the defendant. A verdict was so returned, and from the judgment which followed, the plaintiff appealed.

The only evidence concerning the accident and manner of its occurrence, was the testimony of the plaintiff; and in that we find the following facts. The plaintiff was a day laborer, and worked in the pipe-fitting department of the defendant, in engine room No. 2. His employment came from C. S. Robinson, the defendant's assistant general superintendent, who directed him to report to Mr. O'Brien, the master mechanic; the latter took him to Mr. Kelly, a foreman of the defendant, who assigned him work under the direction of a Mr. Nestrom. Mr. Nestrom was a workman who received higher wages than the plaintiff, and directed the manner of doing the work in which the plaintiff was engaged. Engine room No. 2 was three stories or more in height. Three large engines stood side by side on the ground floor, extending upwards nearly or quite to the top of the room. When the accident occurred, the plaintiff was working on the second story. Prior to that time there had been a passageway, or, as the plaintiff sometimes termed it, a gallery, extending entirely around the room, and protected by a hand-rail on the inside; but shortly before the accident, a portion of this passageway or gallery on the east side of the room had been removed and the floor torn out, to make room for a steam separator, circular in form, and about six feet in diameter, which rested on the ground floor, and extended upward through the opening, and a few feet above what had been the floor of the passageway. This separator was in practical contact with the east wall of the room. The portion of the passageway removed was about fifteen feet in

length. A valve was attached to the separator on its west side which projected out towards the interior of the room some two or three feet. Above the valve was placed a circular valve-wheel, about eighteen inches in diameter, and, at its nearest point, six or eight inches distant from the separator. The valve-wheel lay in a horizontal position, was fastened to the valve, and was about three inches above the level of the remaining floor of the passageway. After the removal of the floor and before the valve-wheel was attached to the valve, the plaintiff and those with whom he was working, in order to reach the south side of the opening, walked around the room over the regular passageway or gallery. After the valve was attached and the valve-wheel put in place, the open space on the north side of the separator, being seven feet or more in length, was spanned by a piece of plank about ten inches wide, one end of which rested on the gallery floor to the north, and the other on the flat valve-wheel. The plank was not fastened or secured in any way, but lay loosely on its supports. It was placed there about two days before the accident, but by whom the plaintiff did not know, and the workmen used it for the purpose of reaching the gallery floor to the south of the separator, instead of going around over the regular passageway. But between the end of the plank which rested on the valve-wheel and the gallery floor to the south there was another open space four or more feet in length. As to the manner in which this space was cleared the plaintiff's recollection was indistinct; or, rather, he had no recollection at all on the subject. He thought it might have been passed by stepping from one side to the other, or there might have been another valve-wheel midway of the distance which could have been used for the purpose of crossing, or the two sides might have been connected by a plank.

Immediately before the accident, Nestrom crossed the plank from the floor on the north side of the separator to the valve, and thence proceeded to the floor on the south side, where there was some work to be done, and called to the plaintiff and the men with him, who were still on the floor on the north side, to "come on." The plaintiff went upon the plank for the purpose of crossing over, and when he had covered about half its length, it slipped from the valve-wheel, and he was precipitated to the floor below, a distance of about twenty-five feet. The consequence was that he sustained serious injury.

The law which plaintiff's counsel conceive to be applicable to the facts, is thus stated by them:

"It is the duty of a master to use ordinary care to furnish and maintain a reasonably safe place for his servants to work in, and to use ordinary care and diligence to keep the machinery, instrumentalities and place in a reasonably safe condition. This duty is personal and can not be delegated, and if the master intrusts this duty to an agent, the latter, as to such duty becomes a vice principal, no matter what relation he may ordinarily sustain to the servant, and the master is liable for the negligent performance of said duty by said agent."

And, starting with this unquestioned and unquestionable proposition, they reason as follows:

"Around this opening was the place where appellant was required to work. This plank was openly and continuously used as a passageway for two days. It was the only direct or feasible passageway from one side of the opening to the other at the place where appellant was working. It was admittedly an unsafe passageway. Can it then be said, as a matter of law, that the appellee had used ordinary care in furnishing appellant a reasonably safe place in which to work, or a reasonably safe passageway for him to

use in performing his work? Can it be said, as a matter of law, notwithstanding the fact that this plank had been used openly and continuously as a passageway for two days or more by a number of men, that appellee did not know, or by the exercise of reasonable care could not have learned, that the passageway was unsafe? The plank was a passageway, and whether appellee knew, or by the exercise of reasonable care could have learned that it was being used as such is, we think, clearly a question of fact. * * * * *

“Whatever may have been the relation of Nestrom and appellant in their labors together in the pipe-fitting department, if Nestrom was intrusted by appellee with the duty of furnishing a safe place, or safe ways, or safe appliances for work, as to those duties he was a vice principal. A master can not shirk his duty to furnish his servants a safe place in which to work, by delegating the duty to one bearing the relation in his ordinary labors of fellow servant to those to whom the master owes the duty of furnishing a safe place, safe ways, etc.”

A fatal weakness of the foregoing argument lies in its assumptions. It assumes that the defendant had not furnished to the plaintiff a reasonably safe place in which to work, or a reasonably safe passageway for him to use in performing his work; and it assumes that Nestrom was intrusted by the defendant with the duty to furnish a safe place, or safe ways, or safe appliances for work. However, it is not the intention of counsel to bring into question the condition of the particular place where the plaintiff was working, or the appliances generally which were furnished to him. It was concerning a passageway only that the plaintiff testified. The assumption that the defendant had not furnished a safe passageway is contradicted by the facts. It had constructed

a secure and well-guarded way around the room. This way was open for use at the time of the accident, and, if followed, would have safely led the plaintiff to the same spot at which he was aiming when he went upon the plank. It was the passageway used by the workmen on the second story, the plaintiff included, to reach the place where they were working after the opening was made and before the valve was fastened to the separator. And the assumption that Nestrom was instructed by the defendant with any duty of furnishing safe ways is equally foundationless. It was unnecessary to intrust Nestrom with such duty, for the defendant itself had already provided a secure and permanent way as part of the construction of its engine room. But the implication is that Nestrom was intrusted with the duty of furnishing another passageway, and that the duty was performed by laying the plank. The supposition is unwarranted. No such duty resulted from the nature of Nestrom's employment, and there was no evidence from which it might, in the smallest degree, be inferred that he had any special authority in the matter, or that the defendant was directly or remotely responsible for the position of the plank. And the fact that after the plaintiff had been accustomed to the use of the regular passageway, he found a plank stretching from the floor to the valve-wheel on which Nestrom and others were walking, and of which he made use himself, gives rise to no presumption unfavorable to the defendant. The placing of the plank involved nothing in the nature of construction. Some one had picked it up, carried it to the place, and laid it there; and if its presence is attended by any presumption, it is that some of the workmen—possibly Nestrom—placed it over the opening to save himself and the others the inconvenience of walking around the room.

And the plaintiff seems to have taken some such view of the situation; for, in explaining a model which he had constructed, and which was used at the trial, he said: "My object was to show that there was two ways, a regular passageway, and we for expediency used this."

The master is bound to use reasonable care in providing for the safety of his servants; it is his duty to furnish safe and suitable appliances, and keep them in proper condition for use; knowledge of defects in the appliances, to which danger is incident, is imputed to him, if by the exercise of reasonable diligence he might have discovered and remedied them; and he cannot escape liability for neglect of his duty by delegating its performance to an employee. By the delegation, the employee, without regard to his rank, or the grade of his employment, becomes a representative of the master, and his negligence is the master's negligence.—*Grant v. Varney*, 21 Colo. 329.

It is sought here to charge the defendant with the consequences of the unsafe character of the contrivance the men were using, because they had used it for two days, and the defendant by the exercise of reasonable care could have ascertained and remedied its defects. But the rule invoked does not apply to appliances which are not furnished by the master, or by his direction, or which the law does not charge him with the duty of providing. In *Flike v. R. R. Co.*, 53 N. Y. 549, it is said that the true rule is to hold the master liable for negligence in respect to such acts and duties as he is required to perform.—See also *Crispin v. Babbitt*, 81 N. Y. 521; *Benzing v. Steinway*, 101 N. Y. 547.

If the condition of the passageway which the defendant did provide had become dangerous, and injury to a servant using it had resulted, the defend-

ant's negligence in failing to discover and remedy the defects might have furnished the person injured with a good cause of action against it. But we have here an unnecessary and merely temporary makeshift, having a precarious hold on the outer edge of the valve-wheel; being necessarily unsteady and unsafe, because, as the wheel was higher than the floor, only a small portion of the surface of the plank could be in contact with the circular rim; and covering only a portion of the space to be crossed. To call such a contrivance a passageway, is a misuse of the term. While it was the duty of the defendant to know the condition of the passageway it had constructed, it was not chargeable with knowledge of the location of the various pieces of plank on its premises, or of the temporary uses to which they might be put by its employees. We are not aware of any rule of law which requires a master to place a watch over his servants to see that they do not set traps for themselves.

The assumption that Nestrom was intrusted by the defendant with a duty to furnish any way or appliance for the work, is purely gratuitous; but the supposition which it includes, that this piece of plank was in fact laid by him is entirely legitimate. Indeed, the situation and circumstances outlined in the evidence, render it extremely probable, if not quite certain, that Nestrom, or some of the men working with him, placed the plank across the opening. An acceptance of the hypothesis that Nestrom did it, leaves us just where we were. Nestrom was a fellow workman with the plaintiff; presumably by reason of his superior knowledge respecting the work to be done, he was authorized to direct the particular manner of its performance, and received higher wages than the others; but the work in which he was engaged had no connection with the furnishing of pas-

sageways or seeing to their safety; so that in respect to the plank, the company was not bound by what he did or what he knew. Nor if his call to the other workmen to "come on," might be construed as a command to cross over on the plank, would the fact be of any importance. He had no right to give such an order, and they were at perfect liberty to disregard it. When the plaintiff essayed to cross upon that plank, he took upon himself the risk of the consequences.

The evidence gave rise to no question for the jury to determine, and the court properly directed a verdict for the defendant.

The judgment will be affirmed. *Affirmed.*

[No. 2190.]

(*In re* Assignment of the Peoples Savings Bank.)

TOLLES ET AL. V. SPENCER, ASSIGNEE.

Appellate Practice—Final Judgments—Assignment Proceedings.

An order in an assignment proceeding denying a motion of attorneys selected by a majority of the creditors to represent the creditors of the estate, to have their appointment made a matter of record and the assignee instructed to recognize them as attorneys for the estate and to give them all business where an attorney's services were needed in said assignment proceeding, was not such final judgment as may be reviewed by the court of appeals either upon appeal or writ of error.

Appeal from the District Court of Arapahoe County.

Messrs. TOLLES & COBBEY, *pro se*.

Mr. J. H. BROWN and Mr. H. M. ORAHOD, for appellee.

WILSON, P. J.

The appellants presented to the district court having jurisdiction of the proceedings in the matter of assignment of The Peoples Savings Bank, what

was termed a petition, in which they set forth that a majority in number and value of all the creditors of the insolvent estate who had proven their claims had in writing appointed the petitioners as their attorneys, and prayed that such appointment should "be made a matter of record in said assignment, and the assignee be instructed to recognize them as the attorneys for said estate, and give them all business where an attorney's services are needed in said assignment proceeding." The petition was denied, and from this ruling petitioners appealed to this court.

The court of appeals is a statutory court. It has only the jurisdiction which the statute expressly gives it, and that is "to review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital."—3 Mills' Ann. Stats., sec. 1002d; Laws 1899, p. 172, sec. 4. The code in prescribing rules for its own construction provides that "the word judgment means all final orders, decrees and determinations in an action; also, all orders upon which execution may issue." In *Flint v. Powell*, 10 Colo. App. 69, it was said, "A final judgment as it has been defined by the courts is an adjudication which shall completely settle, end, and determine the rights of the parties. * * * We are quite unable to see that what are called in the arguments, assignment proceedings, are a suit, action or a proceeding in the legal definition of any of those terms, and that the interlocutory orders which the court may make therein, have, except under peculiar circumstances, the form and effect of final judgments."

Our supreme court has said, "While a strict compliance with forms is not essential in the entry of judgments, yet, to constitute a final judgment the record must not only indicate that an adjudication took place, but the entry must have been intended as

the entry of a judgment. This intention must be fairly deducible from the language employed in the entry. Thus tested, a final judgment will show, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day."—*Dusing v. Nelson*, 7 Colo. 187; *Stevens v. Printing Co.*, 7 Colo. 86.

The so-called petition of appellants was in effect simply a motion. But whatever it may be called, it is clearly apparent that the ruling of the court possesses nothing of the elements of a final judgment. It decreed nothing against appellants, not even the payment of costs. There was nothing in the nature of a finality about it, because it was no bar whatever to any subsequent renewal of the petition or motion, and to the granting of the relief prayed for by appellants if it was proper and within the power of the court. It did not finally determine any rights of the appellants.

For the reason given, we think this court has no jurisdiction to review the ruling of the court in question, either upon appeal, or on error, and the appeal must therefore be dismissed. *Appeal dismissed.*

[No. 2311.]

(*In re* Assignment of the Peoples Savings Bank.)

TOLLES ET AL. V. SPENCER, ASSIGNEE.

Opinion Followed.

This appeal is dismissed upon the opinion in the case of Tolles et al. v. Spencer, ante, p. 294.

Appeal from the District Court of Arapahoe County.

Messrs. TOLLES & COBBEY, *pro se*.

Mr. J. H. BROWN and Mr. H. M. ORAHOD, for appellee.

WILSON, P. J.

The facts in this case are the same as those of the preceding case, number 2190, of the same title, and are fully set forth in the opinion in that case. In this, it seems that the same application was made except upon an amended petition. The prayer was somewhat different from that in the other, it being only that "the court duly recognize their due appointment as in said writing and act contained, and that the same may be made a matter of record in the said assignment proceeding in this court." The petition was denied.

For the reasons given in the preceding case, the appeal must be dismissed. *Appeal dismissed.*

[No. 2248.]

JOHNSON ET AL. V. LAWSON.

1. Contracts—Evidence—Joint Liability—Request for Services.

In an action against three defendants for services alleged to have been performed at defendants' request where the evidence fails to show that one of the defendants, either individually or jointly with his codefendants, made any request of plaintiff to perform the services in question, a judgment against all three defendants is erroneous and must be reversed.

2. Same—Estoppel.

In an action against three defendants for services performed where one of the defendants did not employ plaintiff nor authorize his employment and had no interest in the work performed by him, in order to sustain a judgment against such defendant on the ground that he led plaintiff to believe that he was one of the parties employing him and plaintiff having relied thereon said defendant was estopped to deny that he was one of said parties, the evidence of the representations of such defendant upon which plaintiff acted must be plain and certain.

Appeal from the District Court of Arapahoe County.

Mr. CHAS. D. BRADLEY, Mr. JOHN R. SMITH and Mr. GEORGE A. H. FRASER, for appellants.

Mr. HERMAN RUSSELL and Mr. W. C. KINGSLEY,
for appellee.

GUNTER, J.

Plaintiff sued to recover the value of engineering services alleged to have been rendered at defendants' request, had verdict and judgment against them, and therefrom they appeal. That the services were at their joint request defendants denied.

It is here contended that there was no evidence that McCandless individually or jointly with his co-defendants requested of plaintiff the performance of the services in question. If this be true the judgment should be reversed.

The evidence was the testimony of plaintiff, a telegram, "Exhibit A," letters, "Exhibits C, D and E," testimony of defendants, W. K. Johnson, W. E. Johnson and J. A. McCandless.

Plaintiff, a civil engineer, residing in Denver, there received, January 14, this telegram:

"Florence, Colo., Jan. 14, 1894.

"To W. B. Lawson, * * * Come to Florence to-morrow. Bring transit, level and all data necessary to make survey and estimate for electric light, electric belt railway and water works. Be prepared to stay a month at least. W. K. Johnson."

The night of the next day in obedience to this message plaintiff left for Florence, reaching there the following morning, where he reported to defendant W. E. Johnson, thinking the message signed by him. W. E. Johnson referred him to defendant W. K. Johnson as the proper party, to whom plaintiff then went. W. K. Johnson told plaintiff he would be busy that day and could not then show him the work contemplated. Plaintiff said if the proposed line of railway could be shown him he could employ his time examining it. W. K. Johnson said, in substance,

there is McCandless—pointing to him—he will show you the line. Plaintiff knew McCandless, went to him, and requested to be shown the line of the proposed railway. McCandless consented, and drove plaintiff over the line of the survey.

In the early part of December preceding the date of the above telegram, plaintiff saw in a newspaper what purported to be a dispatch from Florence mentioning some enterprise, and in connection with it the name of defendant McCandless. The contents of the dispatch were not in evidence, nor was there any evidence as to what enterprise the dispatch referred, or what McCandless's connection with it was supposed to be. Thereupon plaintiff wrote McCandless requesting employment on the proposed work. He received no reply. When, as above stated, he went to McCandless, on the suggestion of W. K. Johnson, with the request to be shown the line of the contemplated railway, plaintiff testified that McCandless said: "Mr. Lawson I received your letter some time ago, but I did not answer it because we were not ready to go on with the work, but we think now we are in shape to do so." In the course of the drive over the line of the surveyed road, plaintiff suggested improvements in its proposed location which ought to be made provided nothing in the franchise or right of way would prevent. McCandless said the land over which the survey ran was owned by a coal company and that they could get the right of way for the changes as well as for the road surveyed.

Letters "Exhibits C, D and E" contain nothing material to the alleged liability of McCandless.

The foregoing testimony is all upon which plaintiff relied to charge defendant McCandless.

The uncontradicted testimony of W. K. Johnson was that he resided in Florence, the town was

prosperous, he thought it would be more so, he concluded to have surveys, plans and estimates made for an electric light plant, a water works plant, and an electric railway with the view of organizing three corporations, obtaining rights of way and franchises and then interesting capital and making some money for himself out of promoting the several enterprises. With this object he telegraphed plaintiff as above, and had him perform the services involved. Further, that he sent the telegram at his own instance, that he had no authority from McCandless to employ plaintiff, and that McCandless had no interest in the undertaking.

The uncontradicted testimony of McCandless was, that he did not authorize the employment of plaintiff, and was not interested in the work upon which he was engaged, that he had resided in Florence thirty years, was acquainted with its surroundings, was a large property holder there, that he frequently drove parties out and showed them the resources of the town as a matter of courtesy, that such was his act in driving plaintiff out, and that he had no further connection with him during the two and one-half months he was engaged in performing the services in question, that he at no time said anything to plaintiff about doing for him the work in question. He further testified that he did not receive the letter mentioned by plaintiff as having been written from Denver.

The testimony of W. E. Johnson, so far as it has any materiality to the alleged liability of McCandless, in no degree corroborates the testimony of plaintiff, but inferentially supports that of W. K. Johnson and McCandless.

Plaintiff under cross-examination testified that McCandless did not say anything to him about working for him; when asked if McCandless was in any

way interested with the Johnsons in the work in question he stated that he had no definite information, but inferred from his actions that he had.

There is no conflict in the evidence that McCandless did not employ plaintiff, did not authorize his employment, and was not interested in the work upon which he was engaged. Plaintiff says, however, that McCandless gave him reasonable grounds for believing that he was one of the parties employing him, that he relied thereon, and that defendant is now estopped to deny that he was one of the said parties.

“The representation further to justify a prudent man in acting upon it, must be plain, not doubtful, or matter of questionable inference. Certainty is essential to an estoppel.”—Bigelow on Estoppel, 4th ed., 559.

There is no substantial evidence to satisfy this requirement of the law. Showing plaintiff the line of survey at request of Johnson is entirely consistent with McCandless having no interest in the enterprise, and in his having no intention to employ plaintiff thereon. His remark in effect, I did not answer your letter because we were not ready to go on with the work, but we think now we are in shape to do so, is of no value because of the uncertainty as to what it referred. As stated above the contents of the dispatch, necessary to understand the remark were not before the jury, and what enterprise is referred to is not known. At best such remark of McCandless—if made—could simply create a suspicion that he had some interest in the work upon which plaintiff was entering.

There was no evidence upon which to base a verdict against McCandless. As the judgment must be reversed for this reason, we express no opinion as to

the sufficiency of the evidence against W. E. Johnson.

Judgment reversed.

Reversed.

[No. 2798.]

ORMAN ET AL., AS BOARD OF STATE CANVASSERS, V. THE
PEOPLE EX REL. COOPER.

1. **Mandamus—Appellate Practice—Jurisdiction of Court of Appeals.**

The court of appeals has jurisdiction to review either on appeal or writ of error a final judgment of an inferior court of record in a mandamus proceeding.

2. **Elections—State Board of Canvassers—Jurisdiction—Mandamus.**

The duties of the state board of canvassers in canvassing the returns of an election for representative in the general assembly are purely political and governmental and the courts have no jurisdiction to control its action therein by mandamus.

3. **Same—Discretion.**

Even if the courts had jurisdiction to mandamus the state board of canvassers the writ would lie only to command the board to act, and not to control their discretion by commanding them how to act in a case where there were presented to them what purported to be two sets of abstracts of votes each claiming to be the correct one.

4. **Mandamus—Anticipation.**

The writ of mandamus will not issue in anticipation of an omission to perform a duty or because the relator fears there will be an omission, but there must be shown an actual failure or refusal to perform the duty before a writ of mandamus can issue to compel its performance.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. SAM. B. BELFORD,
for appellants.

Mr. H. J. HERSEY, for appellee.

WILSON, P. J.

This was a proceeding in mandamus instituted against respondents, and appellants, constituting the

state board of election canvassers, which board consisted of the several individuals then holding the five highest state executive offices, namely, governor, secretary of state, auditor of state, treasurer and attorney-general. The petition set forth that the relator was a candidate for representative from San Juan county at the recent general election; that there had been presented to the state board of canvassers two abstracts of the votes cast in said San Juan county for representative, or what at least purported to be such abstracts, the one signed by the county clerk of said county, alone, and showing thereon that the relator had received at such election the highest number of votes cast for representative; and the other signed by two justices of the peace who had been called to assist the county clerk as required by law in canvassing the precinct returns, showing that one J. T. Whitelaw had received the highest number of votes for such office. The petition further alleged, upon information and belief, that it was the purpose and plan of the respondents to unlawfully and wrongfully recognize and act upon the last-mentioned abstract, thereby determining that said Whitelaw had received the highest number of votes cast in said county for representative, and causing a certificate of election to be issued to him to that effect, and prayed that the respondents be compelled by mandate of the court, to recognize and canvass the abstract of votes signed by the county clerk of said San Juan county, and that they be enjoined and restrained and prohibited from canvassing the abstract signed by the two justices of the peace. Judgment was rendered awarding the writ in accordance with the prayer of the petition, and from this the respondents appeal. The case comes up in this court at the present time upon motion of respondents to set aside and vacate so much of the mandate of the district court as en-

joined or commanded the said board of canvassers to refrain from considering, recognizing or canvassing what purported to be the abstract of the votes of San Juan county, signed by the two justices of the peace.

At the outset, relator challenges the jurisdiction of this court, contending that in proceedings of this character the court of appeals has no jurisdiction to review the judgment of a district court, either upon appeal or error. The ground upon which counsel so contend is, as we understand it, that mandamus is a special procedure, and that in the code provisions providing such special procedure, no provision whatever is made for an appeal to this court, or for review by this court of the proceeding on writ of error. In the act creating the court of appeals, the court was invested with jurisdiction to "review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital."—3 Mills' Ann. Stats., sec. 1002d; Laws 1891, p. 119, sec. 4. That a proceeding in mandamus under the code is not a civil case or action cannot be successfully maintained upon reason or authority, and indeed relator does not appear to rely upon such contention. In this jurisdiction, the question if it existed at all, is settled by our own supreme court.—*Stoddard v. Benton*, 6 Colo. 508; *Jones v. Bank of Leadville*, 10 Colo. 479. If mandamus be a civil remedy, as the supreme court says, we cannot conceive of any way in which it can be enforced save by a civil action.

The fact that the court of appeals is confessedly without original jurisdiction to issue writs of mandamus, has no bearing whatever upon the question here presented. The court is also without original jurisdiction to issue any of the original and remedial writs which the supreme court is invested by the constitution with power to issue.—Constitution, art. 6,

sec. 3. We fail to see, however, why this fact has any bearing, even in the remotest degree, upon the jurisdiction of this court to review upon appeal and error the final action or judgment of the district courts in such cases, they being inferior courts of record. Neither has the language of the constitutional provision above cited, giving the supreme court the power to issue such writ, and also "authority to hear and determine the same," any bearing upon the question here presented. By that the supreme court was simply vested with the power to hear and determine the writ which it might issue. Its power or its jurisdiction to review upon appeal or error the action of district courts in the issuance of such writs, was not derived from nor dependent upon the use of that language in the constitution.

That the judgment in this proceeding was not final is not even suggested. This proceeding therefore being a civil action, and the judgment rendered being final, this court has unquestioned jurisdiction to review the latter, either on appeal or error.—*Livermore v. Truesdell*, 7 Colo. App. 470.

- Respondents on their part challenge the jurisdiction of the district court over the subject-matter of this suit, or of these appellants, or either of them, denying the existence of any right, power or authority in it to issue the writ or to enjoin, command or coerce respondents as by the said writ it was assumed and purported to be done.

Counsel take the position that the state board of canvassers in the exercise of the power here in question,—that is, in the canvassing of the returns of an election for representative in the general assembly,—is in the discharge of duties purely political and governmental, and hence that its action cannot be controlled by mandamus. In our opinion this conten-

tion is correct.—*Greenwood, etc., Land Co. v. Routt et al.*, 17 Colo. 157.

It would seem that regardless of the official position of the individuals upon whom should be imposed the final duty of determining in the first instance who has been elected to and should constitute the legislative assembly, the duty would be in the highest degree political and governmental in its character. The legislative department constitutes one of the three separate political subdivisions into which the state government is divided, and it would appear that the determination of its membership, subject only to its own control, would be in the performance of a duty of a political and governmental nature, and a highly important one. The individuals constituting the board consist of the highest officials in the executive branch of the government. The duty is imposed upon them, not as individuals but as executive officials.—Gen. Laws, p. 376, sec. 982; 1 Mills' Ann. Stats., sec. 1631.

In this instance, it was imposed upon James B. Orman, not individually but upon him as then governor of the state, and so of each of the other officials. When a performance of a duty is by law entrusted to or required of an executive department or departments of the government *co nomine*, the performance of the duty is an official act. Although not created by the constitution, it may be said of the state board of canvassers, as was said by the supreme court of the state board of assessors, it is a part of the executive branch of the state government, because it is not part of the judiciary, which construes the laws, nor a part of the legislative department, which makes the laws, and because it is charged with the detail of carrying the laws into effect, to wit, the laws for the election of members of the general assembly.—*People v. District Court*, 29 Colo. 182.

The legislature which created the board entrusted to it the governmental and political duty of determining, subject only to the control of the legislature itself, who had been elected to membership in the legislative branch of the government, and who was entitled to a certificate of election as such. The constitution most jealously guarded the membership of the legislative branch of the state government by providing that it should be the sole judge of the election and qualifications of its own members, a most important consideration to secure the independence of a separate and distinct branch of the government, and it is equally important to secure the same object, that the legislature should have the power to and should create a board, independent so far as possible and free from interference with or control by other departments of the government, which should have the power to determine in the first instance before the legislature assembled, who was *prima facie* entitled to membership in that body. If a board so constituted and under such circumstances were not in the exercise of governmental and political duties of the highest character, then we cannot conceive of what would still be necessary in order to constitute duties of such a character. If the legislature in canvassing the returns of the election of members of the state executive department is charged with duties of a governmental and political nature, a proposition which we have not heard questioned, the same must be true of the state board of canvassers composed of members of the executive department in canvassing the election returns for members of the legislature. We can see no difference in the character of the duties.

Authorities directly in point we have failed to find, and counsel have cited us to none. Many cases are referred to, but their determination is largely

dependent upon varying constitutional and statutory provisions in the various states. The case nearest in point to which our attention has been called, and the reasoning in which commends itself to us, is one from Maine—*Dennett, Petitioner*, 32 Me. 509.

There is nothing in what we have said in conflict with the views expressed by the supreme court in the case of the *Greenwood Land Company v. Routt et al.*, *supra*. In that case it was held that the act in question did not come within the exercise by the governor of any of his political or governmental powers,—that it was purely and simply a ministerial act, in the performance of which he had no official discretion whatever.

Kindel v. Le Bert, 23 Colo. 386, has no bearing upon the question here involved. That case concerned a county board of canvassers, the nature and character of the duties imposed upon and required of which are entirely different from those entrusted to the state board of canvassers.

Even, however, if there should be doubt as to the correctness of the views which we have just expressed concerning the nature and character of the duties of the state board of canvassers with reference to the act here under consideration, and even though it should be conceded that the powers and duties of the state board are ministerial in their character, yet our conclusion that the district court was without power to render the judgment which it did is none the less correct. The rule is elementary and too well known to require citation of authorities in its support, that even as to ministerial acts, where there exists any official discretion at all, mandamus will lie only to command action, and cannot be used to control discretion. Whatever may be said as to the composition of the board and the character of its duties, it cannot be questioned that the court

in this instance undertook to control the discretion of the board. There were presented to the board what purported to be two sets of abstracts of votes from San Juan county, each claiming to be the correct one, and upon this question the board had the right to pass, uncontrolled by any judicial power. Disregarding this rule, however, the court in this instance undertook to decide for the board,—to take away from it the power to exercise any discretion,—to compel the board in advance to accept and act upon one abstract of the votes as the true abstract, and to absolutely reject the other. We think that the mere statement of the fact is sufficient to demonstrate that under all authorities and under all rules, the court was without such power. If the doctrine contended for by relator be accepted then the judiciary could usurp the functions of all canvassing boards, and unduly control, by controlling their membership, both the executive and legislative departments, co-ordinate and intended to be independent branches of the state government. The same principle which would permit it to control the state board of canvassers in respect to its duty to canvass the returns of election for members of the legislature, would empower it to control the legislature in the performance of its duty to canvass the returns of election for members of the executive department, and the state board in canvassing the election returns for representatives in congress and for presidential electors.

There is still another reason, cogent and conclusive, why the court was without authority to render the judgment which it did. It was neither alleged nor shown that the board had refused to discharge the duty, the performance of which it was sought to enforce by mandamus. There was no neglect of duty shown that might be deemed in law the equivalent to a refusal and be sufficient to dispense with the neces-

sity of an actual refusal. There was no omission to perform the duty alleged or shown, because the board was then engaged in the discharge of its duty in canvassing the election returns, had not yet concluded its labors, and the limit of time for this conclusion, as fixed by statute, had not been reached. The writ was prayed solely upon the ground that the relator *feared* that the board would not properly discharge a future duty. It was asked solely in anticipation of a supposed omission to perform a duty. It is uniformly laid down by all authorities, and is well settled, that a writ of mandamus will never be granted under such circumstances. The rule is thus clearly expressed by Mr. High:

“Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ, will refuse to perform their duty when the proper time arrives. It is, therefore, incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; nor does the law contemplate such a degree of diligence as the performance of a duty not yet due.”—High on Extraordinary Legal Remedies, § 12.

For these reasons, the motion to set aside and vacate the injunctive part of the writ will be allowed, and it will be so ordered.

[No. 2230.]

THE OHIO COLORADO MINING AND MILLING COMPANY
v. WILEY AS SHERIFF OF GUNNISON COUNTY.

Jurisdiction—Injunction.

The district court of a county is not without jurisdiction to restrain the sheriff of that county from executing a deed for property in that county sold under a special execution, because the judgment on which the execution was issued was rendered by the district court of another county.

Appeal from the District Court of Gunnison County.

Messrs. BROWN & NOURSE, for appellant.

Mr. GEORGE R. ELDER, for appellee.

WILSON, P. J.

Certain mining property had been sold by the sheriff of Gunnison county under a special execution issued to him upon a judgment rendered by the district court in and for Lake county. This suit was instituted in the district court of Gunnison county to secure an injunction restraining the then sheriff of that county from executing a deed for the property theretofore sold, to the holder of the certificate of sale. After service of summons, the defendant therein appearing specially and in that capacity alone, moved the court to dismiss because of want of jurisdiction. The grounds set forth in the motion were as follows:

“First. That it appears from the complaint that plaintiff seeks an injunction to stay the process of a judgment existing and entered in the district court of Lake county.

“Second. That it appears from the complaint that plaintiff seeks to restrain the execution process of a court of co-ordinate jurisdiction.

“Third. That the action of plaintiff can only be prosecuted, if it can be maintained at all, in the

court in which said judgment is entered, and out of which said execution process is issued.

“Fourth. That it does not appear that the defendant herein is the real party in interest in this action.”

The court sustained the motion upon the first three grounds set forth therein, and dismissed the action, it being recited in the record that the fourth paragraph of the motion was not presented or considered at all.

The sole question presented is whether the court erred in the dismissal of the action on the ground that it was without jurisdiction to entertain it, for the reasons set forth in the motion. This question has been heretofore squarely presented, and decided by this court adversely to the contention of appellee, and to the ruling of the court in this case. —*Smith v. Morrill*, 12 Colo. App. 243.

For the reasons there given, and which it is wholly unnecessary to repeat here, the judgment in this case must be reversed. The determination of the question presented does not depend in the slightest particular upon the merits of the case. It is immaterial upon what grounds plaintiff sought the relief demanded. In the Morrill case it was expressly held that if the suit were commenced in another county than that in which the action might or should be tried under the provisions of the code, it was not a jurisdictional or fatal defect. The remedy is to change the venue, if the defendant objects and makes application for such change.

In oral argument counsel for appellee suggested some questions bearing upon the merits of the case, but upon these the court is not now at liberty to pass. Only one question is presented by the record and to that we are restricted.

The judgment must be reversed.

Reversed.

[No. 2217.]

GILL v. ROBERTSON.

Contracts—Deeds—Assumption of Encumbrance of Grantee.

Plaintiff and J. exchanged real estate. At the request of a real estate agent who acted for J. the deed was made by plaintiff to defendant and contained a clause whereby the grantee assumed the payment of a mortgage encumbrance thereon. Defendant had no interest in the transaction and her name was inserted as grantee without her knowledge or consent. The real estate agent placed the deed on record and notified defendant of the use of her name as grantee but said nothing about the assumption of the mortgage. Afterwards the real estate agent prepared a deed which defendant executed conveying the land to another party. The mortgage was foreclosed and failing to sell for enough to pay the mortgage plaintiff was compelled to pay the balance. Held, that defendant was not liable on the agreement in the deed to assume the mortgage and plaintiff could not recover in an action against defendant for the amount he was compelled to pay.

Error to the District Court of Larimer County.

Mr. H. N. HAYNES, for plaintiff in error.

Messrs. GARBUTT & GARBUTT, for defendant in error.

WILSON, P. J.

Plaintiff Robertson and Bruce F. Johnson made an exchange of real property situate in Larimer county, the plaintiff paying in cash a difference of about six hundred dollars. The negotiations on the part of Johnson were conducted almost entirely by Miss Sarah E. Eddy, who acted as his agent, and in such capacity alone, so far as the plaintiff knew. In reality, she was interested in and the principal beneficiary of the trade, she owning an equity in the land to be conveyed by Johnson, and the cash payment to be made in this trade by the plaintiff being about sufficient to liquidate her indebtedness to Johnson. Each piece of realty had a mortgage encum-

brance upon it, and according to the agreement the grantee in each case was to assume payment of the encumbrance upon the land conveyed to him. The encumbrance upon the land to be conveyed by plaintiff was in the form of a deed of trust executed by plaintiff to secure payment of a note given by him of date September 2, 1889, for the principal sum of \$2,500.00, payable five years after date, with interest at the rate of seven per cent. per annum, payable semi-annually. Upon July 5, 1892, Miss Eddy at Fort Collins in Larimer county presented to plaintiff a deed duly executed by Johnson. Plaintiff thereupon executed his deed, but inserted the name of the defendant herein as grantee, by direction of Miss Eddy, she stating that Johnson had sold the land to defendant. Among the covenants in this deed against encumbrances was the following: "Except a certain deed of trust to secure the payment of \$2,500.00 and interest thereon, the payment of which sum said party of the second part hereby assumes." The deed was after execution delivered to Miss Eddy, who placed it on record in the proper office of Larimer county. Defendant was not present at this transaction and was at that time and at all times thereafter, a resident of Greeley, in Weld county. Some time previous to this, Miss Eddy had informed defendant that she had intended to place some real property in her name, but defendant expressed her objection. Defendant never saw the Robertson deed, and had no knowledge that it had been executed to her until a considerable time thereafter, when Miss Eddy informed her of the fact, but stated that she was not going to hold the land. She did not tell defendant at that time, or at any time, nor did Mr. Robertson or any one else until long afterwards, as will be hereafter mentioned, that there was any assumption clause in the deed, or that by becoming grantee she had assumed

any liability or responsibility whatever. She, in fact, never saw the Robertson deed. On April 19, 1893, at the request of Miss Eddy, defendant signed a deed presented to her by Miss Eddy, already prepared, conveying to a Mrs. Elrod the land conveyed to her by the Robertson deed. On the same day, it appears plaintiff at Fort Collins executed a second deed at the request of Miss Eddy to the defendant, to correct an error of omission in the former deed, and this deed the defendant received by mail from the recorder about a week after she had executed the Elrod deed, but she did not read it or examine it, simply turned it over to Miss Eddy. On March 31, 1896, about eighteen months after the maturity of the note secured by the deed of trust, and nearly four years after the execution of the deed to defendant, the former was foreclosed, but at the sale there was not realized sufficient to pay off the encumbrance. Two days prior to this sale, the defendant was notified for the first time by a letter from the attorney of plaintiff that the deed executed to her by plaintiff contained an express assumption by her of the indebtedness secured by the trust deed. Plaintiff was compelled by suit to make good the deficiency, paying the difference between the amount realized at the sale, and that due upon the note, and he brought this suit to recover such sum from the defendant.

There is no conflict in the evidence bearing upon the facts material to the determination of this controversy, and this court is therefore not concluded by any findings of the trial court. There is not the slightest testimony tending to show that the defendant at the time of or prior to the execution of the Robertson deed had any knowledge whatever of any intention to insert in it her name as the grantee. Her testimony is unequivocally to the contrary, and also to the effect that she never saw the deed and never

knew of its execution until long afterwards. Likewise, her testimony is unequivocal, and there was none tending to dispute it, that she never was informed or had any knowledge of there being in such deed a clause binding her to assume payment of the encumbrance upon it, or of any encumbrance, and that she never had any interest whatever in the transaction, never assumed charge of the property, or knew anything about it, never paid taxes upon it, and never paid any interest upon the indebtedness, or received any notice requesting such payment. The sole question to be determined here is whether under these circumstances and this state of facts, defendant is liable in this suit. We feel quite clear that the answer must be in the negative. It is the law in this jurisdiction that the obligation which the grantee in a deed assumes, to pay an encumbrance upon the land, arises out of contract purely.—*Starbird v. Cranston*, 24 Colo. 25.

It follows, therefore, upon general principles, that in order to be bound the consent of the obligor must be shown in some way. Where the contract is in writing, and signed by both parties, this may be done by proving the signature to the instrument, but where the alleged contract, as in this instance, is unilateral in form, the assent of the party not signing, and sought to be bound, must be shown in some way, as by the acceptance or enjoyment of the benefits and profits from the conveyance. Where the grantee is the actual purchaser—the one who accepts the conveyance and goes into possession of the premises conveyed—the assumption may readily be indulged, from possibly in some cases slight circumstances, that he assented to an assumption clause in the conveyance, but we think that both under the authorities and in reason, the circumstances should be much stronger before such an assumption could

be indulged, where the grantee was one who as in this case was entirely ignorant of the transaction, —never had any interest in it, and never derived any profit from it, was, in fact, a mere involuntary trustee. If this were not the case, it would open the door for the perpetration of very gross fraud. Suppose, for instance, that *A* at the instance of *B* should convey to *C* a tract of land encumbered for far more than its actual value, inserting in the deed an assumption of the encumbrance, without the knowledge or consent of *C*. Suppose *C* thereafter should be informed by *B* that he had caused the title to certain land to be placed in his name by the execution of a conveyance to him, but did not inform him at all of any assumption of indebtedness clause which it contained, and *C* had no knowledge of the fact; and thereafter *C* at the request of *B* should convey the title thus placed in him to another person, could it be successfully contended, either in law or reason, that *C* was liable upon a contract of which he had no knowledge, and to which he never consented, to assume a large amount of indebtedness? The mere statement of the case in our opinion furnishes its own answer.

The recording of the deed does not in any sense show a delivery or acceptance by the grantee so as to bind her, because, if for no other reason, the deed contained a clause which was unusual in and not necessary to a conveyance, and to which the actual assent of the grantee as well as of the grantor, was necessary. Whatever argument, if any, could be based upon the failure of a grantee to read the deed, it is not necessary to consider, because in this case, according to the evidence, the grantee never had a chance to read it. She never even had an opportunity to read the correction deed until after she had conveyed the title which was vested in her. We see noth-

ing in the facts of the case even tending to place upon defendant any equitable obligation to pay this debt, because of any failure on her part to have done what it is claimed she ought to have done. Indeed, there was a failure in this respect, if at all, on the part of the grantor in the deed. Mr. Robertson, upon the mere direction of Miss Eddy, was assuming to enter into a contract with the defendant, who was not present and of whose consent he had no knowledge, whereby she was to assume an obligation of \$2,500.00, and he did not take the precaution thereafter to communicate in any manner with the defendant in order to ascertain if she did or would consent. For authorities bearing upon the question discussed, see: *Girard Life Ins. & Trust Co. v. Stewart*, 86 Pa. St. 89; *Lennig Estate*, 52 Pa. St. 135; *Thompson v. Dearborn*, 107 Ill. 87; *Higman v. Stewart*, 38 Mich. 513; *Bull v. Titsworth*, 29 N. J. Eq. 73; *Culver v. Badger*, *id.* 75; *Parker v. Jenks et al.*, 36 N. J. Eq. 398.

In *Thompson v. Dearborn*, *supra*, it was said: "The law requires something more than the mere insertion by the grantor of a clause in a deed that the grantee assumes an encumbrance. * * * The act of recording a deed cannot amount to a delivery and acceptance when there does not appear an assent or knowledge by the grantee of the act." In *Higman v. Stewart*, *supra*, the court in speaking of a case where the conveyance was actually delivered to the grantee, said, "The mechanical transit of the document containing the clause would not be enough. An intelligent assent,—something evincing an actual acceptance of the tendered bargain, would be necessary. * * * The reception and retention of the paper are evidence undoubtedly of acceptance, but they are not the same thing as acceptance, nor conclusive evidence of it."

If it had been shown that the defendant in this

case prior to the execution by her of the deed to Mrs. Elrod had notice and knowledge that the Robertson deed executed to her contained the assumption of encumbrance clause, and that she made no objection, and had made no effort to have the correction made; the case might be entirely different.

Coolidge v. Smith, 129 Mass. 554, upon which counsel for plaintiff confidently rely, is clearly distinguishable from the case at bar. In that case, a husband, without the previous knowledge or consent of his wife, caused her name to be inserted as grantee in a deed which contained a clause assuming an encumbrance upon the property. The evidence disclosed that the wife had knowledge of the conveyance soon after its execution, and that she thereupon claimed to be the owner of the land; and that after the date of the conveyance she went alone to the house of the mortgagee, and paid interest due upon the mortgage debt, stating that she had purchased the property, and had come to pay such interest. There was also evidence tending to show that the husband had previously in other transactions acted as the agent of the wife with her consent. The materiality of the difference in the facts of the two cases is at once apparent.

Every case of this kind must depend mainly upon the special circumstances connected with and surrounding it. No general rule decisive in all cases can be laid down.—*Elliott v. Sackett*, 108 U. S. 142.

Upon the evidence presented in this case, we have no hesitancy in saying that the judgment rendered was not justified, and cannot be sustained. It must therefore be reversed.

Reversed.

[No. 2211.]

THE DENVER JOBBERS ASSOCIATION v. RUMSEY ET AL.**1. Attachment—Fraud—Instructions—Evidence.**

In an attachment suit where there is no evidence that the defendants fraudulently contracted any part of the indebtedness involved in the suit, the court should not submit such question to the jury.

2. Estates of Decedents—Loan of Funds—Fraudulent Conveyance—Consideration—Attachment.

Where the sole legatees of an estate, consisting of personal property against which there were no debts, the legatees being of age, before any distribution was made authorized the executor to loan the funds belonging to the estate to a partnership composed of the executor and another party, the loan created a debt from the partnership to the legatees, that was a sufficient consideration to sustain a transfer of the property of the partnership to said legatees as against the attaching creditors of the partnership.

Appeal from the District Court of Arapahoe County.

Messrs. BICKSLER, McLEAN & BENNETT, for appellant.

Mr. THOMAS W. LIPSCOMB and Mr. JOHN A. DEWEESE, for appellees.

GUNTER, J.

Rumsey & Company, a partnership composed of John G. and James M. Rumsey, and engaged in the grocery business in the city of Denver, sold its assets to W. T. and Eliza Rumsey, son and daughter of John G. Rumsey. Thereupon certain creditors of the firm assigned their claims to The Denver Jobbers Association, which sued thereon and took out an attachment in aid of the action. Issue was joined on the allegations of the attachment affidavit. Defendants had verdict and judgment, and this appeal is by The Denver Jobbers Association to review alleged errors in the attachment proceeding. It is contended that the verdict is contrary to the evidence. There

was but one issue of fact before the jury and that was: Did the defendants convey their property with the intent to defraud their creditors? Upon this question the evidence was conflicting. The verdict of the jury was not manifestly against the weight of the evidence, therefore, we are not permitted to review it. There was no evidence that defendants fraudulently contracted any part of the indebtedness involved in the suit. For this reason the court committed no error in declining to submit such question to the jury. As stated, there was but one question of fact for the jury. This question was clearly submitted, and under a correct and apt charge found in instructions numbers 1, 3, 4, 5 and 6. In truth the law was given with unnecessary repetition. There was no prejudicial error in an omission of the court to charge, or in the charge given.

It is further insisted that no consideration supported the sale of the assets of the firm to above vendees. The facts pertinent are: An estate consisting of personal property, without debts, W. T. and Eliza Rumsey, sole legatees, was being administered upon by John G. Rumsey as executor. As such he had in his possession \$4,000; no order of distribution had been made; Rumsey & Company desired to engage in the above business; in doing so capital was required; the members of the firm requested of W. T. and Eliza Rumsey—both of age—a loan of \$3,575 from the funds in the hands of the executor. This loan they made, Rumsey & Company agreeing in consideration thereof to pay them the amount loaned with interest. The money was used by the firm in buying out an established business, and in enlarging it. As there were no debts against the estate, a part of which the funds were, no other legatees than W. T. and Eliza Rumsey, no one except these legatees interested in the funds in the hands of the executor

from which the loan was to be made, no one could be prejudiced by the loan except these legatees, and under such circumstances no one other than they could question the loan. Had they sued Rumsey & Company upon its express promise to pay the sum so loaned, they could have recovered. Had Rumsey & Company paid them the money so borrowed they could not again have recovered it of the executor under any order of distribution. In effect it would be the same as if the executor had at their request turned over to them the money held by him as such. If acting upon their request he had done so, they, being then of full age and the only parties interested in the fund, would be bound by the payment.

Waterhouse v. Churchill, 30 Colo. 415 (70 Pac. 678) in principle is in point. The ancestor died intestate, without debts, leaving an estate in cash. The heirs by agreement expended this cash in the erection of a monument and in discharge of certain expenses attendant upon the last sickness of deceased. Later an administrator of the estate was appointed upon the application of the children of one of the heirs—since deceased—who participated in above agreement of disposition. The administrator attempted to recover from the heir who disposed of the estate as above stated, and a recovery was denied. The court held, that as there were no creditors, no one other than the heirs was interested in the estate; that as these had consented to the disposition of the estate, no one of them was in a position to question the disposition. The following citations are made in the course of the opinion:

“The rights of creditors to the assets of a deceased person is the principal reason for requiring official administration, and courts, therefore, sanction the disposition of the property of a decedent without the appointment of an administrator where it is cer-

tain that no debts are owing.—Woerner on Administration, § 201.”

“It is competent for all the heirs of a deceased person if they are of age to settle and pay the debts of a deceased, and divide the property among themselves without the intervention of an administrator, and neither the creditors nor the debtors have a right to complain.”

In *Austin v. Snider*, 17 Colo. App. 182 (68 Pac. 125), a legatee sued upon an appeal bond running to her testatrix. An administrator, with will annexed, had been appointed but had died, no successor having been appointed, it was contended that a successor to the administrator should have been appointed, and that by such personal representative only could the action be maintained. It appeared the testatrix had died without debt, leaving plaintiff as her sole legatee, that no one was interested in the estate except the plaintiff. The action was sustained, the court holding that the estate would be bound by the recovery, and that the plaintiff was the real party in interest in the action.—See also *Austin v. Snider*, 17 Colo. App. 176, 68 Pac. 128.

W. T. and Eliza Rumsey in consenting to the executor turning over the funds in his hands to Rumsey & Co., in effect loaned their funds, and such loan was sufficient consideration for the promise to pay made Rumsey & Co. Such promise to pay Rumsey & Co. the \$3,575 was a sufficient consideration for the delivery of the assets of Rumsey & Co. to W. T. and Eliza Rumsey.

The judgment below should be affirmed.

Affirmed.

[No. 2194.]

BUTTERFIELD V. BUTTERFIELD.

1. Sales—Negligence of Purchaser—Mistake of Seller.

Where plaintiff sold to defendant wheat supposing that he

was selling smutty, no-grade wheat and under such circumstances that he was justified in such supposition and defendant ought to have known that plaintiff was acting upon such supposition, and defendant either knowingly or negligently permitted plaintiff to act upon such supposition to plaintiff's disadvantage, the result is the same as if the transaction had been the deliberate and intentional act of both parties and defendant is liable for the agreed price.

2. Sales—Evidence.

Evidence examined and held sufficient to establish a sale of smutty wheat and the purchaser's liability for the agreed price.

Appeal from the District Court of Arapahoe County.

Messrs. ROGERS & STAIR, for appellant.

Messrs. PATTERSON, RICHARDSON & HAWKINS, for appellee.

THOMSON, J.

This action was brought by the appellee against the appellant on a claim for goods sold and delivered. The appellee had judgment.

The complaint contained two counts. The first alleged the sale and delivery by the plaintiff to the defendant of a quantity of wheat at an agreed price of forty-two cents per bushel, the sum total being \$214.40. The second averred the sale and delivery of the same wheat, and fixed its value at \$214.40. The answer alleged that the wheat was bought by sample; that the sample purported and was represented to be of a grade known in the market as No. 2; that the wheat when purchased was to be shipped by the plaintiff from Creighton, Nebraska, to the town of Hennessey, in Oklahoma Territory, to one M. D. Tait, to whom the defendant had sold it as No. 2 wheat; that the plaintiff so shipped the wheat; that when it arrived at Hennessey, Tait refused to receive it because it was not No. 2 wheat, but was of an inferior grade; that it was, in fact, inferior to the sample on which the purchase was made; that the

defendant undertook to sell it in Oklahoma, and in Kansas and in Missouri, but because of its inferior quality he was unable to do so, and ordered it sent to Denver, Colorado; and that by reason of freight charges from Creighton to Hennessey, and from Hennessey to Denver, and by reason of telegraphic and other items of expense, loss of profits, commission on the sale of the wheat in Denver, and the defendant's labor and trouble in connection with it, there was a balance due him from the plaintiff of \$55, for which he demanded judgment. The replication denied that the grade of either the sample or the wheat was No. 2, or that the wheat was inferior to the sample; and denied also the allegations constituting the counterclaim.

It appears from the evidence that prior to the date of the alleged sale of this wheat, the defendant had purchased wheat from the plaintiff, and that after the transaction in question, the defendant continued his purchases from the plaintiff, the subject of the dealings being No. 2 wheat. It also appears that the plaintiff resided in Creighton, Nebraska, and the defendant in Denver, Colorado; that the transactions between them were conducted by correspondence through the mails and by telegraph; and that, except the sale which is the subject of controversy here, their dealings were all settled and closed before the institution of this suit. Both parties testified; but the evidence consisted, for the most part, of letters and telegraphic messages which passed between them. A considerable number of these relate solely to transactions outside of the one to be investigated, and have no bearing upon the question before us. We shall therefore confine ourselves to the evidence from which the facts constituting this particular sale may be deduced.

On the 2d day of September, 1895, the plaintiff

wrote and mailed a letter to the defendant, which, after reference to matters connected with the general dealings between the parties, concluded as follows: "I have a small car of wheat, of which I mail you a sample to-day, that is in my way in the elevator. I think this sample is better than the car, although it was taken out of the bin. There is some smut in it. What can you give for it?" On the 4th day of the same month the defendant answered this letter, acknowledging its receipt, and referring to the general matters it contained, but saying nothing about the particular wheat on which it asked a bid. On September 6, the plaintiff sent the defendant the following telegram: "Do you care consider proposition my letter September second? Have offer from others. Answer." Receiving no answer to the inquiry, the plaintiff on September 11 wrote and mailed the following letter to the defendant: "I have been selling a little smutty, off-grade wheat in your state to be used for feed. Can you use any of this class of grain? What I sold was pretty black and had some mustard seed in it. Make me a bid on this no-grade wheat if you can use it." On the following day, the 12th, the defendant telegraphed the plaintiff as follows: "Can use wheat like sample forty-two. Answer quick." To this the plaintiff replied on the same day by wire, saying: "Sell you one car, all I have like sample. How many two wheat can you use; what price?" On the next day, the 13th, the defendant telegraphed the plaintiff as follows: "Forty-one one car two wheat, ship Lincoln, care Rock Island."

In pursuance of instructions from the defendant, the car of wheat in question was consigned to L. Butterfield, Lincoln, Nebraska, care of Chicago, Rock Island & Pacific Railroad. On September 27, the plaintiff telegraphed the defendant as follows: "Car

went to Lincoln rejected account smut. Be careful." On October 1, the plaintiff, in response to this telegram wrote the defendant a letter in which, after recapitulating the correspondence relating to this wheat, he said: "I had sent you no sample except this of September 2, and supposed you were bidding on it. I now see it was a mistake, but I do not think you can say it was mine. I am very sorry that anything should go wrong." On October 3, the defendant replied, saying among other things, "You sent me two samples of wheat, one that was good, and the other I could do nothing with, as it was full of smut."

The defendant sent the wheat from Lincoln to Oklahoma; and being unable to dispose of it there, had it shipped to Denver, where he sold it for fifty-four cents per bushel. It is agreed that the words, "Can use wheat like sample forty-two," in the defendant's telegram of September 12 conveyed an offer of forty-two cents per bushel.

It is contended for the defendant that the sample mentioned in that telegram, was a sample of No. 2 wheat, and that he never purchased the smutty wheat. Neither party testified as to any samples, and on the question of samples, we have nothing to guide us but the correspondence. From that, an inference is possible that two samples had been sent to the defendant, one of No. 2, and the other of the smutty wheat; although the plaintiff, in his letter of October 1 said he had sent but one. For the purposes of a discussion of the evidence, it may be assumed that two were sent. A supposition may also be entertained that it was not the intention of the defendant to buy this particular wheat, and that he thought the wheat he was buying was of No. 2 grade. The theory advanced by the defendant is that his telegram of the 13th was his answer to the plaintiff's letter of the 11th; and that his telegram of the 12th referred to

the sample of No. 2 wheat, which it is assumed was sent with the plaintiff's letter of the 2d, and not the sample of smutty wheat which accompanied the same letter. On this hypothesis the defendant never authorized the plaintiff to ship the smutty wheat. However, this is only a theory, constructed from the correspondence to serve the purposes of the argument; for the testimony is silent on the subject. But the theory seems to us to be faulty. Between the 2d and the 11th, there was considerable correspondence between the parties, of which the general contents of the plaintiff's letter of the 2d was the subject, but the question concerning the smutty wheat remained unnoticed by the defendant. On the 11th, the plaintiff by letter again, and explicitly, called the defendant's attention to this wheat; not only describing it as smutty, but as off-grade or no-grade wheat. The sole subject of the letter was the smutty wheat. No other wheat was referred to, and the defendant was asked if he could use that wheat, and on the 12th he said he could use wheat like sample. If his telegram of the 12th was not his response to that letter, and if the sample referred to was not the sample of smutty wheat which he had received, we are unable to assign the telegram a place in the correspondence. It fits nowhere else. But if the defendant thought its language could be understood as referring to No. 2 wheat, the plaintiff's reply sent him by wire on the same day, ought to have undeceived him. That reply notified him of the sale to him of one car—all that the plaintiff had like the sample—and then asked him how many cars of No. 2 wheat he could use, and at what price. We think the defendant's telegram of the 13th was intended as an answer to the plaintiff's inquiry in his message of the 12th, and not to that contained in the letter of the 11th. It did

not answer the letter at all; but it did fully and explicitly answer the telegram.

The defendant was advised by the plaintiff's letter of the 2d that the latter had only one car of the inferior wheat; and a sample of that wheat went with the letter. Outside of the letter, the defendant ought to have inferred from the language of the telegram itself that the wheat which the plaintiff had sold him was not No. 2 wheat; because it advised him that the plaintiff had no more wheat like that sold, but still proposed to sell him No. 2 wheat. It would seem that an inquiry why the plaintiff desired to sell No. 2 wheat, if he had already sold all he had, would naturally have suggested itself to the defendant. But, by referring back to the letter of the 2d, he would have found that the plaintiff, while ready at all times to furnish No. 2 wheat, had only one car of smutty wheat like the sample sent, and it should have occurred to the defendant that the wheat sold, being one car, and all the plaintiff had like the sample, was that identical lot of wheat. This wheat was not shipped for some days after the sale, because the plaintiff was unable to obtain means of transportation from the railroad; and the order could easily have been countermanded and the mistake corrected, without loss or inconvenience to any one. But the defendant said nothing, and suffered the plaintiff to proceed on the supposition that he had sold the wheat; and not until it had gone to Oklahoma and been rejected, did the defendant raise any question concerning it.

Now if the plaintiff was mistaken with reference to the wheat he bought, the mistake was the result of his own gross negligence. The plaintiff had done nothing to mislead him. On the contrary, the plaintiff's language when speaking of the wheat, was clear and explicit. To misconstrue it would require

some ingenuity. That the plaintiff supposed he was selling the smutty wheat, and that the defendant ought to have known that he so supposed, seems entirely clear to us; and if the defendant, either knowingly or negligently, suffered him to act upon a supposition which he had the right to entertain, and so change his position to his own disadvantage, the result is the same as if the transaction had been the deliberate and intentional act of both parties. We think there was a sale of the wheat, and that the defendant should pay to the plaintiff the agreed price.

The judgment will be affirmed.

Affirmed.

[No. 2758.]

RICE ET AL. V. WILLIAMS ET AL.

1. Evidence—Incompetent—Insufficient Objection.

An objection to the cross-examination of a witness as to the contents of a letter on the ground that the witness should be permitted to see the letter and refresh her memory as to what she said, was insufficient to present the objection that the letter itself was the best evidence and that secondary evidence of its contents was incompetent.

2. Evidence—Incompetent—Appellate Practice—Harmless Error.

The admission of incompetent evidence over objection is not reversible error if the evidence is not prejudicial to the interests of the complaining party.

3. Evidence—Motion to Compel Opponent to Introduce Letters.

A party cannot by motion compel his opponent to introduce letters in evidence, but should offer them in evidence himself.

4. Appellate Practice—Instructions—Exceptions.

An exception to instructions as follows: "To the giving of which instructions Nos. 1 to 9 inclusive and each of them contestants by their counsel then and there specifically excepted," is sufficient to present the instructions for review on appeal.

5. Appellate Practice—Instructions—Record—Evidence.

In order to have instructions reviewed by the appellate court the record must present all the instructions given and the evidence upon which they were based.

Appeal from the District Court of Arapahoe County.

Mr. WM. B. HARRISON, for appellants.

Mr. FREDERICK A. WILLIAMS, Mr. EWING ROBINSON and Mr. GEORGE Q. RICHMOND, for appellees.

THOMSON, J.

A paper purporting to be the last will and testament of Caroline M. Rice, deceased, dated the 21st day of August, 1896, together with a codicil, asserted to be her act, dated the 17th day of August, 1899, was offered for probate in the county court by the appellees, who were named in the instruments as executors of the will. The appellants, Edward C. Rice, a son of the decedent, and Caroline E. Rice, his wife, who alleged herself to be a devisee under another will of Caroline M. Rice, made, as averred, later than the will presented, and before the codicil, appeared and objected to the admission of the will and codicil to probate, on the grounds that at the time of the execution of the writing purporting to be a codicil she was of unsound mind, and incapable of understanding its contents, and that the will and codicil which were offered had been revoked by the other alleged will; and asked that probate of the instruments presented be refused, that proof be taken of the contents of this supposed will, and that it be admitted to probate as the last will and testament of the decedent. What the judgment of the county court was we are not advised; but an appeal from it was prosecuted by the losing parties to the district court, where upon a trial before a jury, the will and codicil offered by the appellees, were sustained and ordered to be admitted to probate.

The abstract furnished us by the contestants gives us none of the evidence introduced, except a portion, or, possibly, the whole, of the cross-examina-

tion of Caroline E. Rice, one of the contestants, and a witness in her own behalf. The abstract states that she was examined for the contestants; but what she said on her direct examination is withheld, and we have no means of knowing what that testimony was. Respecting the evidence for the proponents the following is all the abstract contains:

“The proponents first introduced the subscribing witnesses to the will dated August 26, 1896, and the codicil thereto dated August 17, 1899, which will and codicil were offered for probate in this cause by proponents as the last will and testament of Caroline M. Rice, deceased. Said subscribing witnesses gave evidence tending to prove the execution of said will and codicil in the manner required by the statute, and tending to prove that at the time of the execution of said will and codicil respectively, the said testatrix was of sound mind and memory. Thereupon the said will and codicil were offered in evidence.”

In the cross-examination referred to, counsel for the contestants, after exhibiting to the witness, Caroline E. Rice, certain letters which she identified as having been written by her, sought to prove by her portions of their contents. In the course of her examination upon one of the letters, her counsel made the following objection: “I object; if the gentleman is going to introduce that letter in evidence, he should do so and let the witness see it and refresh her memory as to what she said.” This objection was intended to apply to the same course of examination upon each of the letters. The objection was overruled, and the letters themselves were never introduced. Under a ruling of this court in *Rose v. Otis*, 5 Colo. App. 472, the letters themselves were the best evidence of their contents, and upon proper objection, the testimony should have been excluded. But we think the objection which was made, was insuffi-

cient. The objection was not that the testimony was inadmissible; but that the witness should have been permitted to refresh her memory by examining the letter. This did not raise the question of the admissibility of parol evidence of the contents of the letters. Moreover, there is nothing in the evidence before us to indicate that the witness was not afforded an opportunity to examine the letters. But even if the testimony was erroneously received, we are unable to discover wherein it was or could have been injurious to the contestants. It is not every error committed at the trial which will furnish ground for the reversal of a judgment. That it may have such effect, it must appear, in some way, to have been prejudicial to the interests of the complaining party. The contents to which the witness testified, seem to have had very little to do with the issue on trial. Neither they nor the testimony of the witness respecting them in the course of her cross-examination shed any light upon the question of the mental condition of the testatrix at the time of the execution of either the will or the codicil. It is possible that if the direct testimony of the witness were before us, our view of her cross-examination might be different; but it is not here, and our opinion must be based on what we have.

Contestants' counsel sought by motion, after the cross-examination was concluded, to compel the proponents to introduce the letters; but his motion was denied. We know of no rule by which a party may be forced to introduce evidence. If counsel desired the letters in evidence they were there, and he could have offered them himself.

Complaint is made of certain of the instructions. The exception to the instructions is as follows: "To the giving of which instructions, Nos. 1 to 9 inclusive, and each of them, contestants by their counsel then

and there specifically excepted.” For the proponents it is said that this exception was insufficient, in that it did not direct the attention of the court to any particular error; but an exception in substantially the same language was held good in *Ritchey v. The People*, 23 Colo. 314. See also *Bradbury v. Alden*, 13 Colo. App. 208. The abstract did not contain instruction No. 1, nor is the giving of it assigned for error; and we do not know what it was, or what its effect might be on the remaining instructions. To determine whether a case has been properly submitted the instructions must be considered as a whole. Instructions Nos. 7 and 8 have evident reference to testimony which has not been laid before us. Abstractly, they seem to announce correct propositions; and it must be presumed by us that these were properly applied to the evidence. The 5th is asserted to be inconsistent with the 17th. The latter laid the burden upon the proponents of proving that at the time of executing the will and codicil the testatrix was of sound mind and memory; while the former advised the jury that the legal presumption was in favor of her sanity. These instructions may have been contradictory, or they may not. The instruction which is missing may have harmonized them. From the information which the abstract affords, it appears that the proponents did assume the burden of establishing the fact of the sanity of the testatrix at the times when the will and codicil were made, and that, *prima facie* at least, they did establish that fact. The instruction therefore could not have been intended or understood to dispense with evidence from the proponents in the first instance. When the *prima facie* case was made, the requirements of the 17th instruction were satisfied, and the burden then shifted to the contestants. From the course which the trial seems to have taken, it may be presumed that the

court referred to the presumption as attaching when the *prima facie* case was made, and the first instruction may have made the meaning of the 5th plain. But however this may be, to enable us to judge whether the jury could have been misled we must know not only what was the first instruction, but also what the evidence was. For aught that appears, there was no conflict in the testimony. Without an opportunity to examine it, it is impossible for us to know whether there was or not. It may have been so conclusive as to preclude any verdict but the one which was returned; and if so, the language of the instructions is not very material. In any attempt to discuss the question which counsel seeks to raise, we are handicapped by the incompleteness, and more than incompleteness, of the record which he has seen fit to present to us. We fail to see anything faulty in the instructions which we have not specifically noticed; and, being ignorant of what occurred generally at the trial, we are unable to find any good reason for reversing the judgment. It will therefore be affirmed.

Affirmed.

[No. 2213.]

TOURTELOTTE, EXECUTOR OF THE ESTATE OF TOURTELOTTE, v. BROWN, ADMINISTRATOR OF THE ESTATE OF HAWKINS.

1. Appellate Practice—Assignments of Error—Evidence.

An assignment of error based on the admission or rejection of evidence which refers to the testimony of a number of unnamed witnesses and directs the attention of the court to the testimony of no particular one, will not be considered.

2. Evidence—Discrediting Witness—Record—Parties.

The record of a proceeding to remove an administrator finding that through the negligence of the administrator and the fraud of his agent the estate had been defrauded, to which proceeding the agent was not a party, is not admissible in evidence in another cause in which said agent is a witness for the purpose of discrediting his testimony.

3. Evidence—Conversation with Party Since Deceased.

The admission in evidence of a conversation with a party since deceased is not reversible error where the conversation did not affect the issue on trial.

4. Same—Estates of Decedents.

In an action against an administrator a conversation between the administrator and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent is not prohibited from admission in evidence by section 4816, Mills' Ann. Stats.

5. Bills and Notes—Forgery—Evidence.

Evidence held sufficient to sustain a verdict finding that the signature of a deceased person to a note was a forgery.

Error to the District Court of Arapahoe County.

Mr. J. A. McD. LIVESAY, for plaintiff in error.

Messrs. PATTERSON, RICHARDSON & HAWKINS, for defendant in error.

THOMSON, J.

On the 13th day of January, 1890, Monroe L. Tourtellotte presented to the county court of Arapahoe county, for allowance against the estate of Francina Hawkins, deceased, a note to Maggie A. Hurd, her daughter, for \$8,000, dated July 30, 1887, due thirty months after date, with interest at eight per cent. per annum from date, payable every six months or to be compounded, and purporting to have been executed by Francina Hawkins. This note had been indorsed by the payee to Steele & Malone, by them to John F. Tourtellotte, and by him to Monroe L. Tourtellotte. The allowance of this note was resisted by Joseph M. Brown, administrator of the estate of Francina Hawkins, upon the grounds as set forth in a verified answer filed by him; that there was no consideration for the note; that the endorsements were all without consideration, and that the note was not the act and deed of Francina Hawkins. The note was disallowed by the county court, and an appeal to the

district court taken from the judgment. The cause was tried in the latter court in October, 1890. At the trial, the court submitted to the jury specially the question whether the note was a forgery. The jury returned a general verdict for the defendant, and reported that they were unable to agree on an answer to the special interrogatory. Judgment was entered for the defendant on the general verdict, and the plaintiff brought the case here by writ of error. It was held by this court that the question of the genuineness of the note was the controlling issue; and, on the ground that there had been no finding upon that issue, the judgment was reversed.—*Tourtelotte v. Brown*, 1 Colo. App. 408.

A retrial of the cause in the district court, in April, 1892, resulted in a verdict and judgment for the defendant; and the plaintiff again prosecuted error to this court, where, upon the opinion of a majority of the judges composing the court, the judgment was again reversed.—*Tourtelotte v. Brown*, 4 Colo. App. 377.

The plaintiff having departed this life, John F. Tourtellotte, the executor of his will, was substituted for him on June 8, 1894. At the third trial in the district court, in June, 1894, a verdict was returned in the plaintiff's favor for \$13,000. The judgment entered on the verdict was then taken for review to the supreme court by writ of error, and by that court reversed.—*Brown v. Tourtelotte*, 24 Colo. 204.

The result of the succeeding trial in the district court, which occurred in October, 1898, was a verdict and judgment for the defendant; and the case is once more here on error.

At the last trial but one question was presented, and that was whether the signature to the note was genuine. In his opening brief, counsel for the plaintiff, in terms, abandons all his assignments of error

but the second, fifth, seventh, eighth, and those challenging the correctness of the instructions. The second is that the verdict was not supported by the evidence. The fifth reads as follows: "The court erred in permitting witnesses to testify that at the date of the note in controversy, there were moneys due from Maggie A. Hurd to Francina Hawkins." The seventh goes to the refusal of the court to admit a record of proceedings in the county court showing that the witnesses Pickard and Joseph M. Brown had been guilty of gross negligence in the management of the estate, and that the witness Pickard had been guilty of defrauding the estate of various sums of money. The eighth complains of the admission of evidence of a conversation between witness, Joseph M. Brown and Maggie A. Hurd, as to what took place before the filing of the note in controversy as a claim against the estate of Francina Hawkins. Counsel, however, announces that his main reliance for reversal is on the insufficiency of the evidence. This supposed insufficiency is the sole subject of his printed argument. Neither in his opening nor his reply brief does he favor us with a single reason why any rejected evidence should have been received, or any admitted evidence excluded, or attempt to indicate wherein any instruction was erroneous. We have examined the instructions with care, and are unable to see in what particular any of them can be made the subject of valid objection. The fifth assignment is worthless. As to assignments of error, it is required by rule 11 of this court that each error shall be separately alleged and particularly specified. This assignment directs our attention to the testimony of no particular witness. It refers to the testimony of a number of unnamed witnesses and would require us to search the record and find for ourselves what witnesses testified on the subject. It will, therefore, not

be considered. H. A. E. Pickard was a witness for the defendant; and, apparently for the purpose of discrediting his testimony, the plaintiff unsuccessfully offered the record of a proceeding in the county court for the removal of Brown as administrator, in which a referee, appointed to investigate the facts, found that by reason of the negligence of the administrator and the fraud of his agent, H. A. E. Pickard, a collection had been made for the estate which was not reported, and a sum charged against the estate, which had not in fact been paid out. The exclusion of this record is the subject of the seventh assignment. Pickard was not a party to the proceeding; it does not appear from the abstract that he had any opportunity to defend against the charge; and the record was, therefore, no evidence against him for any purpose. It was very properly excluded. Brown was allowed to testify to a conversation with Maggie A. Hurd before the filing of the note for allowance. The objection was that she was dead. There was nothing in the conversation affecting, in the remotest degree, the issue on trial; and even if erroneous, it was entirely harmless. But the eighth assignment is not pertinent. It assumes a conversation relating to something that took place before the filing of the note. But the conversation testified to did not embrace, or purport to embrace, anything that took place before the filing of the note. And the ground of the objection to its admission was not good. It is true that the witness was a party to the suit, but the conversation did not relate to matters transpiring before the death of Francina Hawkins, and the evidence was therefore not within the prohibition of the statute.—See Mills' Ann. Stats., sec. 4816.

We come now to the question of the sufficiency of the evidence to sustain the verdict. A number of

witnesses, who from their relationship with the deceased, were presumably interested in the estate, testified that they were familiar with her handwriting. It was the pronounced opinion of a portion of them that the signature to the note was hers, and the opinion equally pronounced of another portion that it was not. A number of experts who knew nothing of her handwriting, testified from a comparison of this signature with others which were acknowledged to be genuine, that they believed this one to have been written by her. Aside from this class of evidence, there was the testimony of witnesses to facts bearing directly upon the issue. Nathan S. Hurd, the husband of the payee, testified that the note was written by him and signed by Francina Hawkins, in his presence, at his house in the city of Denver, on the 30th day of January, 1887, the day of its date. A. E. Mansfield, a foster son of Francina Hawkins, and his wife, who at that time resided upon a ranch six and one-half miles from Denver, both testified that on the 30th day of January, 1887, Francina Hawkins was at their house upon the ranch; that she came to their house the previous day, and remained there until the day following. They testified to some occurrences—one of an unusual character—which served to fix the date in their memory. It is manifest that if Mrs. Hawkins was at that ranch during the entire day of January 30, 1887, she could not, on the same day, have signed a note at the house of Nathan S. Hurd, six and one-half miles distant.

There was abundant evidence to sustain a verdict for either party. The jury saw and heard all the witnesses; from the mass of conflicting testimony, to determine what the facts were, belonged exclusively to them; they found those facts to be with the defendant, and their conclusion binds us.

The judgment will be affirmed. *Affirmed.*

[No. 2224.]

ARNETT V. BERG ET AL.

1. County Courts—Jurisdiction—Equity.

County courts have jurisdiction of suits in equity where the value of the property in controversy does not exceed two thousand dollars.

2. Fraud—Limitation—Conveyances.

The owner of a lot without consideration deeded it to his wife. Afterwards with the knowledge and consent of his wife he deeded the same lot to plaintiff in consideration that plaintiff should pay off certain encumbrances on the lot. Plaintiff had no knowledge of the deed to the wife at the time plaintiff accepted the deed from the husband. Plaintiff paid off the encumbrance and went into possession and made valuable improvements on the lot. Afterwards the wife deeded the lot without consideration to another party who executed a trust deed thereto to the wife. Held, that in an action by plaintiff against the husband and wife the wife's grantee and the trustee in the deed of trust, to quiet title, limitation would begin to run from the time the wife deeded the property to another party and not from the date of the deed to plaintiff.

Appeal from the District Court of Boulder County.

Mr. T. M. ROBINSON and Mr. PETRUS NELSON, for appellant.

Mr. T. A. McHARG, of counsel.

Messrs. ESTEB & WOLFF, for appellees.

Mr. O. A. JOHNSON, of counsel.

GUNTER, J.

General demurrer to complaint sustained. From judgment of dismissal plaintiff appeals.

The complaint alleges that April 19, 1893, Frank A. Berg was the owner of lots 10, 11 and 12, block 4, Rose Hill Addition to the city of Boulder; that said date he gave a trust deed thereon to secure the payment of a promissory note of \$300, payable to one Harlow; that July 15, 1893, he deeded said lots—without consideration—to his wife, Anna Berg; that Jan-

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uary 22, 1894, said Frank A. Berg and Anna Berg made a trust deed on said lots securing the payment of a promissory note of \$249, payable to Frank Lounsberry; that June 17, 1895, Frank A. Berg agreed with plaintiff, Mary G. Arnett, to convey to her said lots in consideration of her agreeing to discharge the said Harlow and Lounsberry notes, and in pursuance thereof made a deed of said lots to plaintiff; that at the date of last mentioned conveyance plaintiff was in ignorance of the conveyance of January 22, 1894, by Frank A. Berg to Anna Berg, and plaintiff then and there believed that she was acquiring said lots subject to the trust deeds securing the notes assumed; that said Anna Berg at the time of making the said contract between Frank A. Berg and plaintiff, and at the time of the execution of the deed from Frank A. Berg to plaintiff, knew of the contract and deed and intended that plaintiff should acquire thereby all the rights of herself and husband in said lots; that she consented to the making of said contract and deed, and acquiesced therein until April 8, 1899; that plaintiff went into possession of said lots in pursuance of said agreement and deed under the belief that she thereby became the owner thereof, and that ever since said date—except from June, 1898, to May, 1899, during which time Jennie Devlin held title to said lots 11 and 12—she has been, and now is the owner and in possession of said lots, and while so in possession has made valuable and permanent improvements thereon; that in pursuance of said agreement with Frank A. Berg she has discharged the said two notes assumed by her, and that the trust deeds securing the same have been released; that she has paid all taxes assessed upon said lots for the years 1894 to 1897, inclusive, and for the first half of 1898; that no claim upon said lots was made by the said Anna Berg until April 8, 1899; that on last mentioned date Anna Berg,

with the concurrence of Frank A. Berg, without any consideration therefor, executed a warranty deed purporting to convey said lots to one Pyle, who paid no consideration therefor, but took the same in secret trust for Anna Berg and Frank A. Berg with the intent of defrauding plaintiff of her interest therein. On the date of the execution of said deed by Anna Berg to Pyle the latter gave a trust deed on said lots to secure a pretended note to her of \$300.

Plaintiff prays judgment quieting the title in her as against Frank A. Berg, Anna Berg, Pyle and the trustee in the trust deed securing said pretended note of \$300. Other relief is asked immaterial to this ruling.

The complaint contains the further allegation that the value of the property involved does not exceed the sum of two thousand dollars.

Appellees contend that the judgment of dismissal should be affirmed, and assign as reason therefor, that the cause of action sued on was equitable; that the county court has no equity jurisdiction, therefore its judgment dismissing for want of jurisdiction the equitable action was right. This contention is determined by our constitutional and statutory law:

“County courts shall be courts of record and shall have original jurisdiction in all matters of probate * * * and such other civil * * * jurisdiction as may be conferred by law; provided such courts shall not have jurisdiction in any case where the debt, damage, or claim, or value of the property involved shall exceed two thousand dollars, except in cases relating to the estate of deceased persons.”—Const., art. 6, sec. 23; Mills’ Ann. Stats., vol. 1, sec. 395, p. 272.

“The district courts shall have original jurisdiction of all causes both at law and in equity * * *.”—Const., art. 6, sec. 2; Mills’ Ann. Stats., vol. 1, sec. 383, p. 265.

“County courts of the several counties of this state shall hereafter have concurrent jurisdiction with the district courts in all civil actions, suits, and proceedings whatsoever, where the debt, damage or claim, or the value of the property involved shall not exceed two thousand dollars.”—Mills’ Ann. Stats., vol. 1, sec. 1054, p. 834.

By section 23, *supra*, county courts may have such civil jurisdiction as shall be conferred by law within the two thousand dollar limit.

By section 2, *supra*, the district court has original jurisdiction of all causes both at law and in equity.

Section 1054, *supra*, confers upon the county court concurrent jurisdiction with the district court in all civil actions, suits, and proceedings whatsoever within the two thousand dollar limitation.

The suit under consideration was a civil action of which the district court would have had jurisdiction; as the value of the property involved was within the jurisdictional limit, the county court under section 1054, *supra*, had concurrent jurisdiction with the district court of the action.

A recognition of the equitable jurisdiction of the county court appears throughout our constitutional and statutory law. Were it necessary to invoke it, the unchallenged practice in the state during more than a quarter of a century could be given weight in support of the conclusion we have reached.

As stated above, the deed from Frank A. Berg to Anna Berg was made July 15, 1893, and was recorded July 17, same year. June 17, 1895, the deed from Frank A. Berg to plaintiff was made. The present suit was instituted July 29, 1899.

Defendants contend that the action is barred under Mills’ Ann. Stats., vol. 2, sec. 2911, p. 1641, providing in substance that bills for relief on ground of fraud shall be filed within three years after the dis-

covery of facts constituting such fraud, and not afterwards.

A sufficient answer to this contention is that no fraud was intended to be perpetrated, or was perpetrated, until April 8, 1899, when Frank A. Berg and Anna Berg denied that plaintiff was the owner in fee of the premises in suit. The present action was instituted within five months of such time. It is unnecessary to discuss other reasons assigned why this action is not within the statute. The court erred in sustaining the demurrer. Its judgment should be reversed.

Reversed.

[No. 2280.]

THE LOUISVILLE COAL MINING COMPANY V. THE INTERNATIONAL TRUST COMPANY.

1. Pleading—Bills and Notes—Endorsement—Delivery.

In an action on a negotiable promissory note by an endorsee an allegation that the payee "endorsed and transferred" the note to plaintiff was a sufficient allegation of delivery.

2. Same.

In an action upon a negotiable promissory note by an endorsee an allegation that the payee endorsed the note to plaintiff implies a delivery and it is unnecessary to specifically allege a delivery.

Error to the District Court of Arapahoe County.

MESSRS. TELLER & DORSEY, for plaintiff in error.

MR. JOHN S. MACBETH, for defendant in error.

THOMSON, J.

On September 28, 1897, The Louisville Coal Mining Company made and delivered to The Citizens Coal & Coke Company, its negotiable promissory note for \$935, payable two years from date. On December 22, 1899, The International Trust Company brought suit against the maker to recover the amount of the note, alleging that before the maturity of the note, for value received, the payee endorsed and

transferred the paper to it. The defendant demurred to the complaint on the grounds that it did not state a cause of action, and that it did not show that the note was assigned or endorsed to the plaintiff in manner and form as by statute provided. The demurrer was overruled, and, the defendant declining to plead further, judgment was rendered against it for the amount due. The defendant brings the case here by writ of error.

The objection to the complaint urged by the defendant, is that it does not sufficiently show the delivery of the note to the plaintiff after its endorsement. The argument is that the right of an assignee to sue on a promissory note in his own name, is statutory; and that to show a compliance with the statute, the complaint should aver "that the payee by endorsement on the note, and under his hand, assigned and then delivered the note to the assignee." The statement in the complaint is that the payee "endorsed and transferred" the note to the plaintiff. If that allegation does not mean that the payee by endorsement on the note, and under his hand, assigned and then delivered the note to the plaintiff, it has no meaning. The endorsement of a note by the payee is the writing by him of his name on its back; and its transfer by him to another is the making over of its possession to that other. However, the statement was unnecessarily full. A simple allegation that the payee endorsed the note to the plaintiff would have been sufficient. That statement would have implied a delivery, and a specific averment of transfer was unnecessary. Such is the purport of our statute concerning negotiable instruments.—Session Laws, 1897, p. 210.

Section 30 of that statute provides that a note payable to order is negotiated by the endorsement of the holder completed by delivery; and, by the terms

of section 190 of the same statute, which contains a definition of terms used in the act, the word "endorsement" means an endorsement completed by delivery. These provisions are simply declaratory of pre-existing law.—*Clark v. Sigourney*, 17 Conn. 511, 522.

The demurrer was properly overruled, and the judgment should be affirmed.

Affirmed.

[No. 2256.]

INGHAM V. RYAN, EXECUTOR.

1. Pleading—Sufficiency of Complaint—Demurrer.

If a complaint states facts sufficient to entitle plaintiff to recover in any sum it is good as against a general demurrer although it may not state a cause of action for the full amount claimed.

2. Estates of Decedents—Executors—Power to Sell Land—Employment of Agent—Commission.

Where a will empowers an executor to sell land the executor has power to employ an agent to aid him in effecting such sale and to contract to pay the agent commission, and an agent so employed who effects a sale may maintain an action against the executor as such for his commission. The amount of commission that an executor may contract to pay an agent is not limited by section 4805, Mills' Ann. Stats., prescribing the compensation of executors for selling land.

Appeal from the District Court of Arapahoe County.

Mr. W. HENRY SMITH and Mr. O. A. ERDMAN, for appellant.

Mr. PHILIP F. A. RYAN, for appellee.

GUNTER, J.

General demurrer to complaint sustained. Judgment of dismissal. Plaintiff appeals.

The gist of the complaint pertinent to this ruling is: One Cassell died leaving a will whereby he appointed appellee Ryan as his executor, and whereby he authorized him as his executor to sell the real

estate of which he died seized at such times and prices as might seem to him wise. The testator died owning real estate. His executor authorized plaintiff to sell thirty acres at a net sum to the executor of \$687.50 per acre. In pursuance of this power plaintiff set about to secure, and secured, a purchaser who bought the thirty acres at \$850 per acre. Such price per acre being paid to appellee, and a conveyance being executed conveying to the purchaser the land sold. Upon these facts plaintiff asks judgment for the difference between the price at which he was authorized to find a purchaser and the price at which he effected the sale.

The court below held the complaint did not state facts sufficient to constitute a cause of action.

If the complaint stated facts sufficient to entitle plaintiff to recover in any sum the judgment should be reversed. It is unnecessary, therefore, for us to consider or determine what should be the amount of plaintiff's recovery, it is only necessary to determine whether the complaint stated facts sufficient as to the two objections here urged against it to entitle plaintiff to recover in any sum.

Appellee contends that the judgment below should be sustained for two reasons: (1) That the contract sued on was that of the executor, and that no action will lie against the executor, as such, upon a contract made by him. (2) That the statute prescribes the fees an executor shall receive for the sale of real estate, and, therefore, an executor has no power to contract to pay commissions to an agent in excess of such statutory rate; that the commission sought to be recovered here exceeds such statutory rate.

If the facts alleged in the complaint are true, that is, if plaintiff (the agent) under the contract with appellee, (the executor) sought for a purchaser

for the land to be sold, and secured such purchaser upon terms fixed by defendant, and such terms according to his agreement with the executor entitled him to compensation for effecting the sale, then he ought to recover commission or compensation in some amount for the services he thus beneficially rendered under contract with the defendant.

It was in the power of testator to authorize appellee, his executor, to sell his real estate; it was in his power to leave the time of sale, the manner of sale, and the terms of sale to his executor. Under this power the executor could have an abstract prepared to effectuate the sale, could have contracts or deeds prepared for the same purpose, and likewise, if he deemed it necessary, could employ an agent and contract to pay him commissions for aiding him in such sale. If empowered by the will to make these contracts, and he made them, he is liable as executor for their violation.

2 Mills' Ann. Stats., sec. 4805, p. 2463, prescribing the compensation of executors would not control the power given to the executor by the will in this case to employ an agent to aid in effecting the sale, and to agree with him on a compensation. The principle declared by the authorities is if the will authorizes the executor to make a contract, and he makes a contract within the power conferred by the will and defaults in its performance, he can be sued as executor on the contract.

In *Wade v. Pope et al.*, 44 Ala. 690, 695-6, Mrs. Pope was appointed by her husband at his death executrix of his will; the will gave her as such executrix power to carry on the farm and manage it as her husband did in his lifetime. Mrs. Pope qualified as such executrix and managed the farm under the will. As such executrix in carrying on the farm she employed Wade as overseer, and had him to purchase

for the use of the plantation certain mules which were used and worked thereon. Wade procured judgment against Mrs. Pope in her individual name, and then sought by an equitable proceeding to subject the estate for the amount of the judgment. The court dismissed the bill and said:

“The executrix is a trustee, and if the will gives her authority to contract debts for expenses incident to the management of the estate she represents, then she is liable at law for such debts, as such executrix. * * * If the executrix had authority under the will to bind the estate, then the estate was bound at law, and there was no need for a resort to equity; if she had not such authority to bind the estate, then she alone was liable.”

In *Brown v. Evans*, 15 Kan. 88, an administrator was authorized by the court to sell lands belonging to the estate. The law authorized him to pay taxes on the lands, he agreed in effecting a sale that taxes on the land had been paid. The taxes had not been paid, a deed was made for the land, a mortgage given by the purchaser to secure a note for the purchase money. When foreclosure proceedings were instituted on the note and mortgage the court permitted the defendant to recover as an offset the amount he had paid to discharge the tax lien. The court in ruling said:

“Neither do we think that the estate can be held liable for the promises of the administrator, unless the administrator has the right in law to make such promises, or to perform the thing which he promises. But we know of no good reason why an estate should not be held liable for promises made by the administrator where in law he has the right to make such promises, * * * .”

In *Murrell v. Wright*, 78 Tex Rep. 519, the will authorized the executor to sell at private or public sale the testator's personal property. A contract was

made between the executor and plaintiff therein in reference to an unlocated land certificate, and a suit to enforce rights arising out of this contract was maintained.

In *Bostwick v. Beach* et al., 103 N. Y. 414, 421, a will authorized the executrix and executors to sell and convey testator's real estate; they entered into a contract to make such conveyance, but failed to carry it out. An action for specific performance was brought against the executrix and executors and maintained, the court saying:

"We entertain no doubt that where the executors of the will of a deceased person, empowered by the terms of the will to sell his real estate, enter into an executory contract for such sale, performance of such contract may be enforced, in equity at the suit of the purchaser."—See also *Fleming v. Kelly*, ante 23, 69 Pac. 272.

We think the executor had the power to make the contract alleged in the complaint, having, according to the allegations of the complaint, broken such contract we think an action will lie against him therefor. We have considered the sufficiency of the complaint only as to the two objections urged against it, and above discussed. We express no opinion as to its sufficiency on other points should they exist, and arise on a new trial, if one be had.

The judgment below should be reversed.

Reversed.

[No. 2272.]

THE CITY OF PUEBLO V. FRONEY ET AL.

Appellate Practice—Instructions—Abstract of Record.

Assignments of error based on the refusal of the court to give instructions requested will not be considered unless the abstract of record presents all the instructions given.

Appeal from the District Court of Pueblo County.

18	351
20	496

MR. GEORGE W. COLLINS, for appellant.

MR. M. J. GALLIGAN, for appellees.

GUNTER, J.

Appellees had verdict and judgment for damages sustained through the death of their infant son, alleged to have been caused by the negligence of appellant.

The only error assigned is the refusal of the court to give tendered instruction No. 4.

Appellees contend that this assignment cannot be considered because all the instructions given by the court are not before us.

Nineteen instructions were given, only two are in the abstract.

In such condition of the record as presented by the abstract,—upon which we have the right to rely—we cannot say that the refused instruction was not covered by those given by the court, therefore we cannot rule that the court erred in its refusal to give the instruction tendered.—Court of Appeals Rules 1901, No. 14; *Woods v. Chellew*, 15 Colo. App. 368, 370, 62 Pac. 230; *Dawson v. Coston*, 18 Colo. 493, 495, 33 Pac. 189; *McQuown v. Cavanaugh*, 14 Colo. 188, 190, 23 Pac. 341.

Notwithstanding above fatal objection to considering the error assigned, we have resorted to the transcript and find that by given instructions numbers twelve and thirteen the jury was fully and fairly charged upon the question of notice to appellant of the unsafe condition of the stone which caused the death, this being the point sought to be covered by the refused instruction.

Judgment affirmed.

Affirmed.

[No. 2233.]

A. LESCHEN & SONS ROPE COMPANY V. CRAIG ET AL.

18	353
388	116

1. Replevin—Ownership—Evidence.

Evidence examined and held sufficient to establish ownership and right of possession in plaintiff in a replevin suit for property levied on and held by defendants under executions against other parties.

2. Pleading—Estoppel—Replevin.

In an action of replevin by the owner to recover property levied on and held under executions against other parties a defense that plaintiff is estopped to assert ownership of the property as against the execution creditors because the execution defendants were permitted to hold themselves out as owners so as to justify said creditors in believing that they were the owners, cannot be relied on unless it is pleaded.

Appeal from the District Court of Teller County.

Mr. J. STANLEY JONES, Mr. CHARLES C. BUTLER and Messrs. TALBOT, DENISON & WADLEY, for appellants.

Messrs. FINN & ENGLE, for appellees.

GUNTER, J.

Replevin to recover certain mining machinery and tools. Verdict and judgment for defendants. Plaintiff appeals. The complaint alleges ownership and right of possession in plaintiff. This the answer denies, and alleges that defendant Craig as constable seized the property involved under writs of execution as that of the execution debtors, which debtors—it is further alleged—had transferred it to plaintiff without consideration with intent to defraud creditors. Affirmative matter in the answer is denied by the replication. Appellee Gentry was made a party defendant through being custodian of the property while held under the execution.

The issues of fact pertinent to this review are: Was plaintiff the owner and entitled to possession of the property in question? Had a sale thereof

been made by the execution debtors to plaintiff with intent to defraud creditors?

The evidence on behalf of plaintiff was the testimony of witnesses, Henry Leschen, John A. Leschen, members of plaintiff corporation, McDonald, manager of Denver branch of Fairbanks, Morse & Company, Stevens, manager of Hercules Gold Mining Company, and certain checks, receipts, and letters relative to the purchase of the goods in controversy. From this evidence it appears that during July and August, 1897, plaintiff bought of Fairbanks, Morse & Company the machinery and tools involved. One lot, new when purchased, was bought under a proposition made to plaintiff by Fairbanks, Morse & Company July 24, 1897. This purchase was made in the name of plaintiff, paid for by it, and shipped from Denver by Fairbanks, Morse & Company to the Jolly Tar Mine where it remained without change of title until levied on under executions mentioned. The sale of the second lot was about August 11. This lot at the time of the sale was at the Jolly Tar Mine, was owned by Fairbanks, Morse & Company, sold by it to plaintiff, paid for by plaintiff, and remained without change of title until levied on under the executions.

The evidence for defendants consisted of the testimony of witnesses, Bliley, Craig, Gentry, Bell and Sutphine. That of the first two, and the only material part of the testimony of Gentry, going entirely to the issue of value. The remainder of the testimony of Gentry is made up of inadmissible hearsay statements, all of which, however, are consistent with the testimony of witnesses for plaintiff. Bell testified to remarks made by John A. Leschen, from which he said he concluded that Henry Leschen owned the property involved. These remarks, as well as the conclusions of Bell, were inadmissible

as against plaintiff; further, there is nothing in them inconsistent with plaintiff being the owner of the property in controversy. The testimony of Sutphine is consistent with that on behalf of plaintiff. The evidence is convincing and without contradiction that plaintiff was at the time of the institution of the replevin suit the owner and entitled to the possession of the property involved, and that at no time had the execution debtors sold it to plaintiff with intent to defraud creditors.

Appellees contend that plaintiff permitted defendants in the execution proceeding to so hold themselves out as owners of the property as to justify the execution creditors in believing defendants to be the owners, and that plaintiff is now estopped as to such creditors from asserting ownership in itself of the property involved. This defense is matter in estoppel, and cannot be relied upon unless pleaded.—*Prewett v. Lambert*, 19 Colo. 7, 12, 34 Pac. 684; *Gaynor & Standley v. Clements*, 16 Colo. 209, 210, 36 Pac. 324; *De Votie et al. v. McGeer*, 16 Colo. 467, 24 Pac. 923.

It was not pleaded. Further, there was no evidence to sustain it.

On the ground that the evidence without contradiction showed that plaintiff was the owner and entitled to the possession of the property involved the judgment for defendants was wrong and should be reversed.

Reversed.

[No. 2276.]

KYLE AS ASSIGNEE OF THE BANK OF MONTROSE ET AL.
V. SHORE ET AL.

1. **Juries—Equitable Action—Suit to Cancel Deed.**

An action to cancel a deed on the ground of fraud in its procurement is an equitable action and it is discretionary with

the court whether or not issues of fact shall be submitted to a jury, and a denial of a demand for a jury trial is not error.

2. Fraudulent Conveyance — Husband and Wife — Mortgages — Notice.

A conveyance of real estate by a husband to his wife in settlement of a bona fide debt owing by him to her is good as against a prior unrecorded mortgage executed by the husband to the same property, where the wife accepted the conveyance in good faith and without notice or knowledge of facts sufficient to charge her with notice of the mortgage.

Error to the District Court of Montrose County.

Mr. S. S. SHERMAN and Mr. JOHN GRAY, for plaintiffs in error.

Messrs. GERRY & TAYLOR, for defendant in error, Ida Shore.

GUNTER, J.

Anderson Shore, one of defendants in error, was indebted to The Bank of Montrose, evidenced by two notes, one in the principal sum of three thousand dollars, the other in the principal sum of two thousand dollars, secured by trust deed upon the real estate involved herein. The bank requested payment, and through its aid Shore borrowed of a third party thirty-five hundred dollars, and secured the same by trust deed upon the interests here involved, and with the sum so secured discharged the three thousand dollar note, principal and interest. In order to make the trust deed securing the thirty-five hundred dollars thus obtained a first lien, the bank released the trust deed securing its above two notes and took a second trust deed to secure the unpaid note of two thousand dollars. September 28, 1897, the trust deed securing the note of thirty-five hundred dollars was executed and placed of record. Upon the same date was executed the trust deed securing the note of two thousand dollars. The lat-

ter trust deed was not then placed of record, it was laid aside, and in the confusion which attended the failure of the bank, which occurred soon thereafter, this trust deed was not placed of record for some time later, and not until after October 5, 1897.

Mrs. Ida Shore, wife of Anderson Shore, and one of defendants in error, had during her married life, at his request, loaned him at one time two thousand dollars, and at another twenty-eight hundred dollars. These sums being her individual property before her marriage with Anderson Shore. When she loaned him these sums he promised to repay them with interest at the rate of 10% per annum. She frequently requested of Shore payment of or security for these sums, and on October 5, 1897, at her request, he deeded to her, subject to the thirty-five hundred dollars trust deed above mentioned, the real estate involved herein being a part of the real estate, as stated, covered by said trust deed. She accepted the equity thus conveyed to her and certain personal property and other interests in satisfaction of the then indebtedness of Shore to her, which indebtedness aggregated at that time about seventy-five hundred dollars. Her deed was put of record, and she took possession of the real estate covered thereby, and certain personal property sold to her by bill of sale of the same date. Subsequently The Montrose Bank failed, its assets were assigned to plaintiff in error Kyle, the trust deed securing the two thousand dollars discovered and placed of record. Thereafter the assignee and trustee in such deed brought this suit, alleging that the quit claim deed was executed with the intent to defraud The Bank of Montrose, and was received by the grantee with knowledge of such intent, and with notice of the prior unrecorded trust deed securing the sum of two thousand dollars, and plaintiffs prayed for a decree cancelling the

quit claim deed, and declaring it a lien upon the property conveyed thereby inferior to the lien created by the trust deed securing the sum of two thousand dollars. The case was tried to the court which made the following findings:

“1. That the defendant, Ida Shore, was a *bona fide* purchaser for a good and valuable consideration * * * of the premises described in plaintiff's complaint; * * *

“2. That defendant Ida Shore had no knowledge or notice actual or constructive of the certain deed of trust executed by the defendant Anderson Shore to secure the note of two thousand dollars as described in plaintiffs' complaint.”

Thereupon the court entered a decree for defendants. To review the decree plaintiffs below are here on error.

When the cause came on for trial plaintiffs in error demanded a jury for the trial of the issues of fact involved. This over their objection and exception was denied and the trial had to the court. Plaintiffs insist that this was error. The cause of action was to set aside the quit claim deed involved on the ground of fraud in its procurement.

The cause of action was equitable. It is discretionary with the court in equitable causes of action whether issues of fact shall be tried by the court or sent to a jury. If submitted to a jury their verdict is simply advisory and not binding upon the court. Such was the rule before the adoption of the Code, and such has been the rule since.—*Abbott v. Monti*, 3 Colo. 562; *Kirtley v. Marshall Silver M. Co.*, 8 Colo. 279, 285, 6 Pac. 920; *Danielson v. Gude*, 11 Colo. 87, 92, 17 Pac. 283;

The court committed no error in the denial of a jury trial.

2. The gist of the other contentions of plaintiffs

in error is that the findings and judgment are not sustained by the evidence. Seven witnesses were called, two for plaintiffs, five for defendants. If the testimony submitted by defendants was credited Anderson Shore was indebted to his wife, Mrs. Ida Shore, October 5, 1897, about seventy-five hundred dollars, principal and interest, upon money loaned. At her request he had conveyed to her certain property including the property involved herein in satisfaction of such indebtedness. She had received such conveyance in good faith, and without notice or knowledge of facts sufficient to charge her with notice of the trust deed sought to be declared by this action a prior lien to her quit claim deed. The trial court believed the testimony in behalf of Mrs. Shore, and made its findings accordingly. As there was evidence to support them we are bound by the findings.

The judgment should be affirmed.

Affirmed.

[No. 2270.]

THE BOSTON NEWMARKET GOLD MINING COMPANY V.
ORME.

Contracts—Lease—Accord and Satisfaction—Option.

Defendant being indebted to plaintiff executed to him a lease on a mine for three months with an option to continue for six months. Plaintiff agreed to apply the royalties coming to defendant as they became due on the indebtedness until the debt should be fully paid and agreed to accept that method of payment of all of defendant's liability. Plaintiff operated the mine for three months and credited the royalties as agreed, but they were insufficient to pay the defendant's debt. Held, that the contract of lease was not an accord and satisfaction of the defendant's debt but that at its termination the plaintiff might sue for the unpaid balance and he was not required to exercise his option of working the mine three months longer before he could bring his action.

Appeal from the County Court of Boulder County.

MESSRS. GIFFIN & ROWLAND, for appellant.

MR. CLARENCE JARBEAU, for appellee.

THOMSON, J.

On December 14, 1898, the appellant, a mining corporation, owed the appellee \$163 for work performed in and about its mining premises. On that day it executed a lease for a portion of its mine to the appellee, and eight others to whom it was also indebted, for three months with the privilege of six. The contract of lease, after fixing the royalties to be paid by the lessees to the lessor, provided that those royalties should be paid by the latter to the former, and applied and credited *pro rata* on its liabilities to them, until the sums due them should be fully paid. The contract concluded as follows: "In witness whereof, the said parties have hereunto set their hands and seals in duplicate,—accepting above method of payment for all liabilities of said lessor due said lessees." The lessees operated the leased premises for the period of three months as fixed by the lease, and during that time the appellant paid to the appellee on his claim three sums of money, as follows: December 24, 1898, \$23.12; February 24, 1898, \$22.61; and March 14, 1899, \$21.09. These sums were credited on the amount due him. The lessees did not avail themselves of the privilege offered in the lease, but surrendered the premises to the appellant at the expiration of the term of three months. About June 21, 1899, appellee had conversations with the managing officers of the appellant respecting the balance due him. They asked him to be patient, assuring him that he would receive his money in a few days. The money not being forthcoming, on the 21st day of October, 1899, the appellee brought suit before a justice of the peace to recover his demand. The justice gave him judg-

ment, and the defendant appealed to the county court, where judgment being again rendered in his favor, the defendant appealed to this court.

The only point made by the defendant here is that the giving and acceptance of the lease operated as an accord and satisfaction; and we are cited to a number of authorities holding that the acceptance of a collateral thing of value in full satisfaction of a claim, is a bar to an action on the claim. We have no occasion to differ with counsel as to the effect of accord and satisfaction. The weakness of his position lies in the want of necessary facts to render the law applicable to the case.

An accord and satisfaction is the substitution, by agreement of the parties, of something else in place of the original claim; and, when executed, its effect is to extinguish the antecedent liability.—*Bulliam v. Taylor*, 50 Miss. 251; *Heavenrich v. Steele*, 57 Minn. 221; *Babcock v. Hawkins*, 23 Vt. 561.

No witness undertook to say that the lease was accepted by the plaintiff in satisfaction of his claim. In support of its contention, defendant relies solely on the provisions in the lease that the royalties derived from the mine should be applied and credited *pro rata* on the liabilities of the lessor to the lessees until full payment of the debts; and that the lessees accepted such method of payment of the entire indebtedness. But it is evident from the language employed that it was not intended by the parties that the execution and delivery of the lease should operate as an extinguishment of the indebtedness. On the contrary, the liabilities were recognized as continuing. They were to be reduced by the application upon them from time to time of the royalties received by the lessor; but their extinguishment was not contemplated until they should be fully satisfied by payment. And the agreement of the lessees to

accept the proposed method of payment of their claims, would have no meaning if those claims were regarded as extinguished by the execution of the lease. In such case there would be no claims to pay. Apparently, the parties supposed that the royalties which the premises would yield during the term of lease would be sufficient to discharge the indebtedness, and no provision was made for further payment in case they should not. But the liability of the defendant had already attached, and the contract nowhere provided for its extinguishment except by payment. The acceptance of the lease and the method of payment for which it provided might suspend the defendant's right of action upon his claim until the expiration of the term; but when the term did expire, and his claim was still unpaid, he was not barred by any covenant in the lease from falling back upon the defendant's original and unextinguished liability.

But counsel says that the lessees should have availed themselves of the privilege, extended by the contract, of working the premises three months longer. He thinks that as they accepted a method of payment which necessitated the extraction by them of ore from the mine, they were bound to occupy the full space of time allowed them by the contract. But by their agreement they accepted that method for three months and no longer. They had the privilege of continuing their operations for another period of three months, but it was entirely optional with them whether they should do so or not. Their contract bound them to test the specified method for three months, but it bound them no further; and if the result of their experience during that period, was that the method was a failure, they could hardly be expected to avail themselves of their privilege.

If from the language of the contract, there might

be a question as to the intention of the parties, the conversations between the plaintiff and the defendant's officers, after the surrender of the premises, would set it at rest. It was not pretended by those officers that the lease was received in satisfaction of the debt; it was not intimated that the mine ought to have been worked longer; the claim as reduced by the application of the royalties was recognized and conceded as subsisting, valid and enforceable; and assurances of its payment were given. There is no merit in the defense.

Let the judgment be affirmed.

Affirmed.

[No. 2225.]

MUIR V. PRATT ET AL.

1. Contracts—Rescission—Fraud—Pleading—Appellate Practice.

In an action to rescind a contract for the purchase of land and to recover back the purchase price placed in escrow where the sole ground for the rescission alleged in the complaint was the fraudulent representations of the seller, and the cause was tried upon that theory, the appellate court will not consider an argument based on the point that the contract being verbal and executory could be rescinded by either party at his pleasure and as a matter of right.

2. Contracts—Rescission—Fraudulent Representations.

In an action to rescind a contract to purchase land and to recover back the purchase price on the ground of deceit and false and fraudulent representations by the seller as to the location of the land, the crops it would grow and the depth at which water could be procured, where the evidence shows that plaintiff went upon and examined the premises before purchasing and that the only statements made by the seller as to the crops it would grow and the depth at which water could be found were mere expressions of opinion based on the crops grown and the depth of water on adjacent lands, the court properly directed a verdict for defendant.

Error to the County Court of Arapahoe County.

Messrs. THOMAS & THOMAS, for plaintiff in error.

Messrs. WARD & WARD, for defendants in error.

Mr. W. H. DAVIS, *pro se*.

THOMSON, J.

The judgment below was for the defendants, and the plaintiff has brought the case here by writ of error.

The complaint alleged that on the 6th day of May, 1899, the defendant, Noah R. Pratt, represented to the plaintiff that a friend of his whom the plaintiff afterwards found to be his son, Arthur A. Pratt, had a valuable piece of land situate in Bijou Basin, in Elbert county, which he held in virtue of a valid homestead filing; that the land was improved with a dwelling house and some fencing; that water could be found on the land at a depth not exceeding thirty feet from the surface; that all kinds of crops could be raised on the land without irrigation; that he could induce his friend to relinquish his filing on the land for \$250; that the relinquishment was worth that sum; that the plaintiff could then make a filing of his own in the United States land office in Denver, and become the owner of the land; that, believing the representations to be true, and not knowing to the contrary, he was induced by the defendants, Noah R. and Arthur A. Pratt, to deposit with the defendant, W. H. Davis, \$250, Arthur A. Pratt at the same time depositing with Davis a pretended relinquishment of his homestead filing, the condition of the deposits being that Davis should hold them until certain papers should arrive from the east, upon the arrival of which he should turn the relinquishment over to the plaintiff, and the money to the defendant, Arthur A. Pratt. It was further averred that the representations made by Noah R. and Arthur A. Pratt were knowingly and

intentionally false; that the land was not in Bijou Basin; that all kinds of crops could not be raised on the land without irrigation; that what was represented as a dwelling house, was a 'dug-out'; that there was no fencing on the land; that water could not be obtained within thirty feet by sinking a well; that Arthur A. Pratt did not have a valid or subsisting homestead filing on the land; that his filing was made on the 12th day of January, 1898, and that he never took up his residence on the land, or made any improvements upon it, and that long prior to the day when he made the pretended relinquishment, he had wholly abandoned it, having therefore on the day of the relinquishment nothing to relinquish; that as soon as the plaintiff discovered the falsity of the representations, he notified the defendant Davis to return to him the money he had deposited, and to the other defendants the relinquishment; and that he also notified the other defendants that he withdrew from the trade, and demanded of them a release to him of the money, but that Davis refused to deliver him the money, and the other defendants, notwithstanding their fraud and wilful deceit, laid claim to its ownership. Judgment was demanded against all of the defendants for \$250, and a finding and judgment against the defendants Pratt as for fraud and wilful deceit.

The defendant, Davis, answered that he held the \$250, mentioned in the complaint as custodian only; that he had no interest in the money or the controversy; and that he was ready and willing to pay the money over to the person or persons to whom the court might award it.

The answer of the defendants Pratt admitted that certain of the representations alleged to have been made by the defendant, Noah R., were made by him; admitted the deposit with Davis of the \$250 and the relinquishment, upon the conditions stated in the

complaint; and denied the other allegations of that pleading. This answer alleged further that the plaintiff, before depositing his money with Davis, and before the execution of the relinquishment by Arthur A., made a personal examination of the entire tract of land concerning which he was negotiating, informing himself fully respecting its capabilities, and the improvements upon it, and with the knowledge thus acquired, offered to purchase the relinquishment for \$250; that the relinquishment, and all papers necessary to a homestead entry by the plaintiff for himself, were thereupon prepared and submitted to the receiver of the land office, who approved them; that, however, upon being informed that the plaintiff was not born in the United States, but that his father had been naturalized, the receiver required a certified copy of his father's naturalization papers before permitting the entry by the plaintiff; that thereupon the money and the relinquishment were placed in the hands of the defendant Davis, with instructions, as soon as the naturalization papers should arrive, to pay the money to Arthur A., and deliver the relinquishment to the plaintiff; and that a certified copy of the naturalization papers had long since arrived.

The replication, except as to the visit to the land and the presentation of the papers for entry by the plaintiff to the United States land office, was a denial.

The plaintiff testified that the defendant, Noah R., told him that the land was in Bijou Basin; that he went with one of the Pratts to the land and examined it, giving a description of its surface appearance; that he went through the building styled a "dug-out," which he described as being constructed of logs and covered with a roof; that he asked Pratt how deep he would have to go to find water, and was answered, about thirty feet; that Pratt told him he could raise all kinds of crops on the land, speci-

fyng, however, only, oats, corn and potatoes; that he then returned to Denver, and concluded the bargain; that his money and the relinquishment of Arthur A. Pratt were deposited with Davis to await the arrival of the naturalization papers; that a day or two afterwards, taking a span of horses and a wagon, with a quantity of provisions, and some articles furnished by one of the Pratts, he undertook to go to the land, but before reaching it lost his way, and returned to Denver, and made demand for his money, for the expressed reason that the land was not what it had been represented to be. He further testified that the land was not in Bijou Basin; and said that he had sent for and received the naturalization papers.

Aside from himself, there was but one witness for the plaintiff. This witness testified that he had lived for four years about two and a quarter miles from the land in question; that a crop could not be raised in his neighborhood every year, at least not on his land; that he raised two crops while he was there; and that the wells at different places around him were from thirty to one hundred and fifty feet deep.

The defendants Pratt introduced a number of witnesses. It was proved by them that Arthur A. had constructed the dug-out, and placed a certain amount of fencing on the land; that while wells had been sunk on adjacent land, none had been sunk on that land, and it had not been cultivated; that abundant crops of sorghum, corn, oats, wheat, potatoes and alfalfa grew in the immediate neighborhood without irrigation; that water had been obtained on adjoining land at a depth varying from twenty-one to forty feet; and that it could probably be found on the land in question within thirty feet.

A jury had been empanelled to try the case, but,

after hearing the evidence, the court discharged them, holding that there was no question of fact for them to pass upon, and thereupon gave its judgment to the defendants.

The principal point made for the plaintiff is that the contract was verbal and executory; that it could therefore be rescinded by either party at his pleasure and as a matter of right; and that the plaintiff did rescind it. It is unnecessary to discuss the effect of the escrow, or inquire into the right or power of either party to revoke it without the consent of the other, for the complaint was not constructed, nor the case tried, upon the theory of the existence of such right or power. The complaint charged that the purchase by the plaintiff was induced by false and fraudulent representations made by the Pratts, and a finding of wilful deceit was asked, which, if made, would have subjected their persons to execution upon the judgment. The sole ground upon which the plaintiff based his right to a return of his money, was the deceit by means of which he alleged himself to have been inveigled into the transaction. What the representations were, how they accorded with the facts, and whether the plaintiff relied upon them, were the only questions presented by the pleadings; and if upon those questions the evidence which was produced left no room for a difference of opinion, there was nothing for the jury to consider, and the court did not err in withdrawing the case from them.

Now we are unable to discover any particular in which the charges, or any of them, against the defendants made by the complaint, were sustained by the evidence. Whether the locality in which the land lay was called Bijou Basin or Bijou Bottom, is immaterial. What difference in meaning there may be between the terms Bijou Basin and Bijou Bottom, we have not been advised; but the plaintiff saw and in-

spected the land, and knew its location, before he concluded the bargain. He also knew the amount and nature of the improvements upon it, and knew that it had not been cultivated. The statement of one of the defendants that certain kinds of crops could be raised upon it, was, in the absence of experiment, necessarily only an expression of opinion, as was also his estimate of the depth at which water might be obtained. The expression of an opinion is not the statement of a fact; but from the evidence of what had been done on adjoining lands it seems clear that these opinions had a substantial basis, and were fully justified. It is said that the homestead entry by Arthur A., was not, at the time of the transaction, a valid and subsisting claim. We find nothing in the evidence to support the assertion; but every fact in connection with it was open to investigation by the plaintiff. There was no concealment, and no effort at concealment, by the defendants Pratt, or either of them, of any fact connected with the land or the title; and in so far as the evidence affected their statements, or the statements of either of them, it sustained them.

The judgment should be affirmed.

Affirmed.

[No. 2252.]

CHURCH ET AL. V. BAKER ET AL.

Injunction—Action Upon Bond—Attorneys' Fees.

Where an injunction was merely ancillary to the principal relief demanded in the action and a demurrer to the complaint and motion to dissolve the injunction were filed at same time and upon hearing the demurrer was sustained and the injunction dissolved, in an action upon the injunction bond to recover attorneys' fees in the matter of dissolving the injunction the plaintiff is entitled to recover only the value of the attorneys' services rendered in securing the dissolution of the injunction and not for any services rendered in the preparation and trial of the main case and, where the evidence was only as to the value of the entire services rendered in the case without any attempt to

show what part was properly chargeable for services in securing the dissolution, the plaintiff was not entitled to recover.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. MILTON SMITH,
for appellants.

Messrs. ROGERS, CUTHBERT & ELLIS, for appellees.

Mr. PIERPONT FULLER, of counsel.

WILSON, P. J.

This is an action to recover upon an injunction bond. John B. Church, one of appellants, commenced suit against the appellees to secure an accounting, and also praying an injunction restraining defendants from doing and performing certain acts and things in the bill mentioned. The injunction was granted upon the execution by plaintiff Church of a bond, with William Church as surety. Thereafter the defendants appeared and filed at the same time a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and also a motion to dissolve the injunction. Upon hearing, the demurrer was sustained, and the injunction thereupon dissolved. Soon thereafter, the defendants brought suit upon the injunction bond to recover the sum of \$250.00 alleged to have been expended by them in the matter of the dissolution of the injunction. Upon final hearing of this suit, the defendants therein, the makers of the injunction bond, prevailed, the court directing a verdict in their favor. The main action continued to be prosecuted, and after its final determination, the defendants therein, Baker and Felt, again instituted suit to recover on the injunction bond, the sole damages claimed being, as in the former suit, on account of the payment by them of the

sum of \$250.00 for attorneys' fees, in the matter of dissolving the injunction. The defendants pleaded *res adjudicata*, claiming that the former suit, in which the court had directed a verdict for defendants, was upon the same cause of action, and that the trial thereof was upon the merits. The plaintiffs in this suit disputed this, and claimed that the former suit was decided against them on the sole ground that the main action, in which the injunction had been issued, was still pending and undetermined at that time. In the view which we take of this case, we think it entirely unnecessary to go into or pass upon this question. In our opinion, upon the authority of *Tabor v. Clark*, 15 Colo. 435, the judgment in this action cannot be upheld.

It seems clear to us that the injunction here was simply ancillary to the principal relief claimed. The main purpose and object of the suit was to secure an accounting, and this was ultimately had. Plaintiffs were entitled to recover the value of the attorneys' services in the matter of securing the dissolution of the injunction, and in that matter alone. The parties to the bond could not be held for the value of any legal services rendered in the preparation and trial of the main case. The only evidence given in reference to the character of the legal services rendered was that of the attorney who rendered them, and is undisputed. We make the following excerpt from his evidence, as set forth in the abstract:

"The \$250.00 covers the total amount they paid us for services in the cause up to the time the injunction was dissolved. The question involved upon the hearing upon which that injunction was dissolved, was whether the facts set forth in the bill showed that the plaintiff was entitled to recover at all against the defendants, and it covered every allegation in the

complaint, and necessitated an examination, presentation and argument of a number of different questions; the motion to dissolve the injunction and demurrer were all argued together." The injunction was dissolved because the demurrer to the complaint was sustained, and this demurrer was addressed to the main case involving the question as to whether plaintiff was entitled to recover at all against the defendants. It would appear from this testimony that the services were rendered in the main case, and hence plaintiffs would not be entitled to recover upon the injunction bond. In any event, however, even if some part of the services can be said to have been rendered in support of the motion to dissolve the injunction, and to be properly chargeable therefor, there was no attempt to apportion the value of the services, that it might be determined what portion were chargeable against the services in support of the demurrer, being in the main case, and what portion were chargeable against the motion to dissolve. The amount sought to be recovered in this suit was the entire amount paid to and received by the attorneys, both for services in support of the demurrer, and of the motion to dissolve the injunction. Hence, upon the case as presented, the plaintiffs were not in either event, upon the authority of the case cited, entitled to recover.

For these reasons, the judgment will be reversed.

Reversed.

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[No. 2208.]

CONNOLLY V. HUGHES ET AL.

Mines and Mining—Adverse Suit—View of Premises.

In an adverse suit to determine the right to a mining claim where the plaintiff's claim was put in issue by the pleading and he introduced no evidence whatever in support of his claim, he was not entitled to demand a view of the premises by the jury

as provided in section 188a, Mills' Ann. Code, and a denial of such demand by the trial court was not error.

*Error to the District Court of Lake County.
On Rehearing.*

MESSRS. BLAKE & THOMPSON, for plaintiff in error.

MR. ALFRED MULLER, for defendants in error.

MR. H. H. HINDRY, of counsel.

THOMSON, J.

The defendants in error made application in the proper land office for a United States patent to the Populist lode mining claim. Within the period prescribed by law, the plaintiff in error, claiming title to the Prospect No. 1 lode mining claim, the surface boundaries of which embraced a portion of the territory covered by the location of the Populist claim, filed his adverse claim against the application, and in due time commenced this suit to try and determine the title to the ground in conflict. In his complaint he alleged the location of his claim upon a portion of the unoccupied and unclaimed mineral domain of the United States, as to the location, averred compliance in all respects with the laws of the United States and of the state of Colorado, and demanded judgment for the portion of the claim embraced in the application for patent.

The defendants answered denying the allegations of the complaint, averring the prior location of the Populist claim in compliance with the laws of the United States and of the state of Colorado, and demanding judgment in their favor for the ground in dispute. The allegations of the answer with respect to location were denied by replication.

Before entering upon the trial, it was stipulated by the parties that except as to the discovery of a

vein upon it, each of the claims had been located in compliance with law. The stipulation left for trial only the question of discovery upon the respective claims. There was verdict and judgment for the defendants.

The abstract furnished by the plaintiff gives us none of the evidence, but says, simply, that it was conflicting. Supplemental abstract, prepared by the defendants, says that upon the filing of the stipulation the defendants introduced evidence in support of their claim, and that thereupon the court instructed the jury.

It appears inferentially from the abstract furnished by the plaintiff, that at some point in the course of the trial the plaintiff asked the court to send the jury in a body to view and inspect the premises, and that the request was refused. The refusal is assigned for error, and no other error is alleged.

It appears that the plaintiff introduced no evidence whatever in support of his claim. Section 188a of Mills' Annotated Code provides as follows:

“In all suits, actions and proceedings now pending or which may hereafter be brought, in any court of this state involving the title to, the right of possession of, or the mineral contained in, any mine or mining claim, it shall be the duty of the court, at the trial of such suit, upon the application of either party interested therein, to send the jury empanelled in the case, in a body, to view and inspect the premises.”

The original argument for the plaintiff was confined to the support of the proposition that the foregoing language is mandatory, and that, therefore, the court had no discretion to refuse the application. We are not disposed to question counsel's construction of the section; and as to that, the opposing counsel do not take issue with him. But at the trial

the plaintiff made no effort to sustain his alleged title. By his conduct he confessed that he had none. If he had no title there could be no recovery by him, and he was without interest in the result. The section contemplates a case where some fact, open to observation, upon which title or right of possession is predicated, is in dispute between the parties; and its theory is that a personal inspection will enable the jury more understandingly to consider and weigh the testimony they have respectively introduced.— See *Fleming v. Daly*, 12 Colo. App., 439, 449.

But a plaintiff whose title is denied, and who offers no evidence in his own behalf, is not in a position to demand the inspection for which the section provides. The inspection is not allowed as a substitute for evidence. The plaintiff, by making no effort to establish his alleged discovery, conceded that none was ever made; and if none was made, he had nothing which could be the subject of inspection. An inspection could be of no manner of benefit to him, and he was, therefore, not injured by the refusal to order it.

But it is now urged that by virtue of the act of congress of March 3, 1881, 21 U. S. Statutes at Large, p. 505, which provides that if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict, the general government is a party in interest represented by each of the parties to the suit for the purpose of seeing that the other party does not prevail without proof that he has complied with all the requirements of the law respecting the acquisition of title upon the mineral domain of the United States. This point is made for the first time in the petition for rehearing, and it is argued that, as a representa-

tive of the general government, the plaintiff was entitled to an allowance of his demand for a personal inspection of the premises by the jury. Under what circumstances the United States may be said to be interested in the result of a suit brought upon an adverse claim, must be determined from the language of section 2326 of the Revised Statutes to which the act of 1881 refers. That section provides that upon the filing of the adverse claim, the proceedings for a patent shall be stayed until the controversy shall have been settled or determined by a court of competent jurisdiction, or the adverse claim waived; that the adverse claimant shall commence suit upon his claim within thirty days after its filing, and proceed with reasonable diligence to final judgment; and that his failure to do so shall be a waiver of his adverse claim. It seems clear from the foregoing language that a waiver of the adverse claim leaves the applicant at liberty to continue his proceedings for a patent. The waiver concludes the controversy between him and the adverse claimant as completely as a final judgment in the suit. Now, there is nothing in the act of 1881 to render it applicable where there is such waiver. It contemplates a prosecution of the action brought pursuant to section 2326, and a trial and determination of the hostile claims asserted by the parties to the record; and it is only upon such trial, that the jury may find that neither party has established title.

The waiver of his claim by the adverse claimant, or a final judgment in favor of either party, does not conclude the general government. If there has been a failure of compliance with the terms upon which its grant of title is conditioned, proceedings may be instituted in its behalf and in its name to arrest the issuance of patent, or to annul it after it is issued; but to a suit between individual claimants

of a portion of its domain, it is not a party, and is interested incidentally only to the extent that upon the trial of the issues between the parties to the record, neither shall have judgment unless he shall have established his title. The only verdict affecting its interest which the statute authorizes, is one that neither of those parties has established his title; but a matter which is not in dispute cannot be properly submitted to a jury for a finding; and a confession by one of them that he is without title, removes all question as to his rights from the consideration of the jury; so that, in such case, their finding, if the case remains with them, must be confined to the showing made by the other party. But this is not the finding for which the statute provides. If there is any sense in which either party can properly be said to be a representative of the United States, he is such only while he is engaged in active efforts to sustain his own claim, and thereby defeat the claim of his adversary.

By the terms of section 2326, the plaintiff's failure to produce evidence was a waiver of his claim; and by the waiver, the stay upon the defendant's proceedings for a patent was removed. The defendant, without the introduction of evidence in his own behalf, was entitled to a judgment of nonsuit against the plaintiff, and to a dismissal of his action.—*Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633.

Instead of moving for a nonsuit, the defendant proceeded to introduce evidence in support of his own title; but the plaintiff was as completely out of the case as if his action had been dismissed, and the question for the jury to determine was not whether neither party had established title, but whether the defendant had. The plaintiff's claim had ceased to be an obstacle in the way of the application for patent; but, the defendant having waived his right

to a nonsuit, it devolved upon him affirmatively to prove the facts from which, under the law, title in him might be deduced. This, however, he had the right to do without molestation from the plaintiff. In a trial of the conflicting claims of parties to an adverse suit, it is held that neither can rely upon the weakness of title of the other, but must independently establish his own. And in addition to his evidence in his own behalf, he has the right to disprove the evidence on which the other relies. But one, although a party to the record, who asserts no title in himself, cannot claim the right to attack the title of the other. Having no interest of his own to be subserved by the overthrow of the other's claim, his position is that of a stranger; and if he undertakes to interfere with proceedings in which he has no concern, he is an intermeddler. Our attention must be directed to some law of which we are now ignorant, before we should feel warranted in saying that a stranger or an intermeddler can be a representative of the United States in an adverse suit, even although it was instituted by himself.

By virtue of the situation in which the plaintiff placed himself, he lost the right to contest, in his own behalf, the defendant's title, and lost any right he may have had to safeguard the interests of the United States. His demand for an inspection by the jury, was entitled to no consideration.

The judgment should be affirmed.

Affirmed.

[No. 2269.]

THE SANFORD CATTLE COMPANY v. WILLIAMS.

1. Corporations—Powers of Agent—Bills and Notes.

The general manager of a corporation organized for the purpose of dealing in and raising cattle and other stock and acquiring lands and other property necessary to its business, who

had charge of the corporation's business with authority to represent the company in such transactions as are usually incident to such business, has no implied authority to execute in the name of the corporation a promissory note and bind the company thereby.

2. Same—Notice.

The fact that the manager of a corporation who executed an unauthorized promissory note of the corporation was also a director would not charge the corporation with notice of the unauthorized act.

3. Same.

Authority of an agent to purchase property for a corporation and to contract an indebtedness against the corporation therefor would not include the power to execute and bind the corporation to pay a promissory note due in eighteen months with a higher rate of interest than the legal rate and ten per cent. attorney's fee if collected by an attorney.

Appeal from the District Court of Weld County.

Mr. HARRY E. CHURCHILL, for appellant.

Messrs. GARRIGUES and SMITH, for appellee.

THOMSON, J.

The appellee brought suit against the appellant upon the following instrument:

"\$500.00. Greeley, Colo., May 13, 1891.

"Eighteen months after date, I, we or either of us promise to pay to the order of M. B. Williams, Five Hundred Dollars at Union Bank, Greeley, Colorado, including exchange, collection charges, and interest at ten per cent. per annum from date until due. And in case of default, principal and accrued interest to bear interest from maturity at the rate of fifteen per cent. per annum until paid; together with ten per cent. attorney's fees, if collected through an attorney, either by suit or otherwise; interest payable annually.

"Value received.

"For..... "The Sanford Cattle Co.

"No..... "S. Sanford, Manager."

The execution of the note was denied by the answer. The plaintiff had judgment, and the defendant appealed.

The defendant was a corporation, organized for the purpose of dealing in and raising cattle and other stock, and acquiring lands and other property necessary in the carrying on of its business. The incorporators were John Best, Stewart Sanford and Louis C. Snyder, and they were also its directors. The office of the company was in Central City, Gilpin county; and it occupied a ranch in Weld county, on which Sanford resided. On the 13th day of May, 1891, Mr. Sanford, representing himself as the company's manager, bought an engine from the plaintiff, to be used, as he said, in operating a pump for the irrigation of the company's land. The price was \$500, and the note in suit was executed as evidence of the debt. Whether Sanford had authority to execute the note in behalf of the company, was the only question in the case.

The evidence was that, apparently, Mr. Sanford had charge of the company's business in Weld county. Instances were given of sales by him of the company's cattle, his employment of help in the baling of hay, and in the round-up, his receipt of money for the company, and the payment by him of bills against the company. The evidence might warrant the conclusion that Sanford represented the company in the transaction of its business in Weld county, and possessed the powers usually incident to the conduct of such business. Whether the purchase of this engine was within the scope of his apparent authority, is at least doubtful. If it was not, a ratification by the company would be necessary to render it liable on the contract. But there was no evidence that the company ever received the engine, or derived any benefit from it, or even knew of its existence. However, the

question of the liability of the company on the contract of purchase, is not in the case. The suit was brought on the note, and if that was not the note of the company, the action must fail.

There was no pretense that Sanford had any direct authority to execute the note; as a director of the company merely he had none; and if such authority existed at all, it must be implied from the other facts which were laid before the court. The strongest inference those facts will justify is that Sanford was the company's general manager, and had full charge of its business in Weld county. That business was confined to dealing in cattle and other stock, and acquiring such lands and other property as might be necessary in carrying it on; and, in virtue of his authority as general manager, he might bind the company by his purchase and sales of cattle and stock, his employment of labor, and his acquisition of property necessary to its business. But this general authority would not include the power to pledge the credit of the company, or to bind it by a written contract for the payment of its debt in the future. The issuing of promissory notes was not a power necessarily incident to the conduct of the business in which the company was engaged, and, therefore, not within the scope of the authority possessed by Sanford as general manager.—*Breed v. Bank*, 4 Colo. 481; *N. Y. Iron Mine v. Bank*, 39 Mich. 644; *Electric Light Co. v. Hutchinson*, 25 Ill. App. 476.

In *N. Y. Iron Mine v. Bank*, Cooley, J., in an elaborate discussion of the question, said:

“It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. *White v. West-*

port Cotton Manf'g Co., 1 Pick. 215, is not an authority for that position, nor is any other case to which our attention has been invited. In *McCullough v. Moss*, 5 Denio 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors so to do, could not bind the corporation by a note made in its name. *Murray v. East India Co.*, 5 B. & Ald. 204; *Benedict v. Lansing*, 5 Denio 283; and *The Floyd Acceptances*, 7 Wall. 666, are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse to the injury, and indeed to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of directors may determine."

If Sanford, while conducting the company's business, had previously made notes in its name, which it had paid, or if, with knowledge of this note, it had failed to disavow it, it is possible the case would present a different aspect; but, so far as appears, Sanford had never before undertaken to bind it by note, and there was no evidence that it had any knowledge of the existence of this note until suit was brought. It is said, however, that as Sanford was a director of the company, his knowledge was its knowledge; and that he knew of the existence of the note, for he made it. There are cases in which a corporation may be charged with a knowledge possessed by a director, but this is not one of them. Sanford executed the note himself; and in undertaking, without authority, to impose an obligation on the company, he occupied a position adverse to it. He was not acting in its interest. The argument amounts to this, that a corpo-

ration will be bound by the act of a director injurious to its interests, because his knowledge of what he did himself, is imputable to it; and its acquiescence will be inferred from its silence. Thus a director might pledge the credit of his company for his own advantage until bankruptcy ensued, and the corporation would be helpless, because his knowledge, although carefully concealed, of his own fraudulent acts, would estop it from disputing their validity. Such is not the law. The knowledge possessed by an officer of his own unauthorized act, is not the knowledge of the corporation.—*Barnes v. Gas Light Co.*, 27 N. J. Equity 33; *Hyde v. Larkin*, 35 Mo. App. 365; 4 Thompson on Corporations, § 5310.

In *N. Y. Iron Mine v. Bank*, *supra*, the agent for whose act beyond his authority the corporation was held not liable, was also a director.

On the hypothesis that Sanford had the power to contract an indebtedness against the company on account of the engine, by the instrument he executed, he undertook to charge it with burdens and obligations not implied in the contract of purchase. The note, as made, would disable the company from discharging its debt for eighteen months, and would compel it to pay as interest, until due, two per cent., and afterwards, seven per cent., more than the legal rate, and to pay ten per cent. in addition, if it should be collected, with or without suit, through an attorney; and even a general power to execute notes for its debts, would not embrace the instrument before us.

Upon the showing made at the trial, this note was not the note of the defendant, and the judgment must be reversed.

Reversed.

[No. 2202.]

THE COLORADO FUEL AND IRON COMPANY v. KNUDSON.
Appellate Practice—Judgments—Nonsuit.

Where an action was dismissed at the cost of plaintiff the

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defendant cannot have the judgment reviewed on appeal. An appeal to the court of appeals from such judgment will be dismissed and the cause docketed on error.

Appeal from the District Court of Pueblo County.

Mr. JOHN M. WALDRON and Mr. D. C. BEAMAN,
for appellant.

THOMSON, J.

The Colorado Fuel & Iron Company has attempted an appeal to this court from a judgment dismissing an action against it and awarding the costs against its adversary. The judgment was in its favor. Nothing was adjudged against it. From such a judgment there can be no appeal by it. The question which it seeks to raise can not be considered in this proceeding. It can bring the case here only by writ of error.—*Hall v. Pay Rock C. M. Co.*, 6 Colo. 81; *Harvey v. Traveler's Ins. Co.*, 18 Colo. 354; *Fischer v. Hanna*, 21 Colo. 9; *Booth v. Water Co.*, 9 Colo. App. 495.

The appeal will be dismissed, and the action will be entered as pending on writ of error.

Dismissed.

[No. 2807.]

ELDRED V. JOHNSON.

Towns — Incorporation—Contesting Validity—Jurisdiction—Mandamus.

In a proceeding to incorporate a town the county court has not jurisdiction to consider a protest against the incorporation on the ground that the petitioners for incorporation are not land owners as contemplated by law. And where a county judge refused to furnish the petitioners a certified copy of such proceeding to be filed in the recorder's office, on the ground that subsequent to holding the election and publishing the result a protest had been filed, mandamus will go to compel him to certify the proceeding.

Error to the District Court of Fremont County.

Mr. CHARLES D. BRADLEY and Mr. JOSEPH H. MAUPIN, for plaintiff in error.

Messrs. YEAMAN and GOVE, for defendant in error.

WILSON, P. J.

This case involves a review of the proceedings of the county court of Fremont county in the matter of an attempted incorporation of the town of Chandler, situated in said county. The statute controlling such proceedings will be found in 3 Mills' Ann. Stats., section 4364, and 2 Mills' Ann. Stats., secs. 4365 and 4366. It appears that all the requirements of the statute had been complied with except the making and filing in the recorder's office of the county, of a certified copy of all papers and record entries relating to the matter of the incorporation, on file in the office of the clerk of the county court, as specified in section 4366. This was the final act to be done, and when this was complete, the incorporation would be perfected. Upon application to the county judge by the defendant in error in behalf of himself and other petitioners for incorporation, for a certified copy of these papers and entries so required to be filed in the recorder's office, it was refused upon the ground that subsequent to the holding of the election and the publication of the result, an elector and taxpayer within the limits of the proposed town had filed a protest, the ground of which was in effect that the petitioners for incorporation were not land owners such as was contemplated by law. The defendant in error then applied to the district court for a mandamus to compel the county judge to make out and deliver the required certified copy of the papers and entries in the matter of the incorporation. The writ was issued, and the proceeding in this mandamus case is brought for review on error.

The case comes before us at the present time on application of the plaintiff in error that the writ of error be made a supersedeas. The granting or refusal of the supersedeas depends upon the character of the duties imposed upon the county court in the proceedings for incorporation. This has already been passed upon and determined by the supreme court in a decision handed down at its last term.—*Velasques et al. v. Zimmerman et al.*, 30 Colo. 355, 70 Pac. 419.

That case was very similar to the present one in all respects. In its opinion, the court said, "The statute does not appear to vest the county court with judicial powers to hear objections or render a judgment of any character either when the petition is filed or when the report is made by the commissioners of election. * * * It seems to us that the legislature did not contemplate in the enactment of the statute that a contest should be inaugurated in the county court, but that the persons aggrieved should resort to some other remedy. * * * It seems to us that the person or persons who were injured by the incorporation of the town can contest the validity of the proceeding by *quo warranto*."

The decision of that case settles the law in this jurisdiction, and under its authority this court is compelled to deny the supersedeas.

Supersedeas denied.

[No. 2278.]

THE MIDLAND FUEL COMPANY v. SCHUESSLER.

1. Pleading—Certificate of Indebtedness—Interest.

A written certificate of indebtedness will draw interest at eight per cent. per annum. In an action upon such certificate an answer that merely denies that any interest is due or owing on the indebtedness does not put in issue any material allegation of the complaint.

2. Pleading—Attachment—Affidavit—Traverse.

In an attachment proceeding the attachment issues are pre-

sented by the affidavit in attachment and the traverse thereto. The allegations in the affidavit cannot be put in issue by the answer to the complaint.

3. Same.

An affidavit in attachment dated December 8, alleging that defendant is about to fraudulently transfer its property to hinder creditors, is not put in issue by a traverse dated December 19, wherein it denies that it is about to do so. Such traverse is not a denial that it was about to fraudulently transfer its property at the time the affidavit was made.

4. Same—Amendment—Discretion of Court—Appellate Practice.

An application to amend a traverse of an attachment affidavit is addressed to the discretion of the court, and where it does not appear from the record upon what the court acted in denying such application the appellate court will not review its action thereon.

Error to the District Court of Garfield County.

Mr. C. W. DARROW, for plaintiff in error.

Mr. J. W. DOLLISON, for defendant in error.

GUNTER, J.

The complaint alleges that August 20, 1896, the defendant was indebted to plaintiff in a certain sum, and that on such date defendant issued and delivered to plaintiff a certificate of indebtedness, wherein it acknowledged itself indebted to plaintiff in said sum. It further alleges certain payments, and prays judgment for the balance due with interest from August 20, 1896.

In the 4th paragraph of the complaint it is alleged that defendant is about to fraudulently transfer its property so as to hinder creditors, and especially the plaintiff.

In aid of the action plaintiff filed an attachment affidavit wherein it is alleged *inter alia* that defendant is about to fraudulently transfer its property to hinder its creditors, and sued out an attachment. The answer to the complaint contained two paragraphs:

(1) "Denies that there is any interest due or owing on the alleged indebtedness or certificate of indebtedness referred to in said complaint."

(2) "And this defendant denies each and every allegation contained in the 4th paragraph * * * in the said complaint."

The affidavit in attachment was of date December 8. December 19, defendant filed a traverse of the affidavit in attachment wherein it denies that it is about to fraudulently transfer its property or any part thereof so as to hinder or delay its creditors or any one or more of them.

When the case was called for trial the defendant "asked that the issues raised by the affidavit in attachment and the traverse thereto be tried separately," which was granted, and a jury empanelled for the trial of the issues so presented. Thereupon plaintiff requested the court to charge the jury that the traverse of attachment did not put in issue one of the grounds of the attachment stated in the affidavit, and that the jury should find the attachment issue for the plaintiff. Defendant asked to amend the traverse, which was denied. It then insisted, and does here, that its denial of an immaterial averment of the complaint, to wit, the averment of paragraph four, constituted a traverse of plaintiff's affidavit in attachment. This contention was overruled by the trial court. The main action was then by consent submitted to the court.

As seen from above answer there was nothing to try in the main action, because the answer did not put in issue any material averment of the complaint. The court entered judgment for the amount admitted to be due August 20, 1896, with interest at the statutory rate. The error assigned to judgment is in the allowance of interest.

The defendant (appellee) contends that the in-

debtedness involved did not bear interest. As stated, no fact alleged in the complaint was denied. According to these facts, August 20, 1896, defendant was indebted to plaintiff in a certain sum due upon an instrument in writing. This being true, the court was right in allowing interest on the indebtedness. 1 Mills' Ann. Stats., sec. 2252.

Whether the allegations of the affidavit in attachment were put in issue must be determined by the traverse thereto, and not by the answer to the complaint. The code prescribes that the attachment issues shall be presented by the affidavit in attachment and the traverse. The parties in this case presented the attachment issues in this manner.

When the case came on for trial defendant asked to have the issues raised by the affidavit in attachment and the traverse thereto tried separately to a jury. This was granted, and we think the trial court right in determining the attachment issues by the affidavit and the traverse thereof. The affidavit alleged that on December 8, the defendant was about to fraudulently transfer its property with the intent to hinder creditors. The traverse made on December 19, denied that the defendant upon December 19, was about to fraudulently transfer its property with intent to hinder creditors. This was not a denial of the allegation in the affidavit, to wit, that defendant was about on December 8, to fraudulently transfer its property with intent to hinder creditors, and it is so ruled in *Wehle v. Kerbs*, 6 Colo. 167. Thereupon defendant asked leave to amend. This was denied. Upon what the court acted in so exercising its discretion we are not advised, so we cannot say it erred. The rule is thus announced in *Dyer v. McPhee*, 6 Colo. 174:

“A motion to amend an answer having in this cause been addressed to the sound discretion of the court, nothing short of a plain and arbitrary abuse

of right would justify this court in reversing the ruling of the court below in denying the motion."— See also *Bransford v. Norwich Union Fire Soc.*, 21 Colo. 34, 39 Pac. 419.

For foregoing reasons the judgment for plaintiff in the main action and upon the attachment should be affirmed. *Affirmed.*

[No. 2240.]

CALEY V. PORTLAND ET AL.

Mines and Mining—Lease—Assignment—Consideration.

Where a mining lease for a certain term was assigned, the assignee agreeing to work the mine and to pay the consideration out of the net proceeds, he was not required to work the mine continuously through the entire term of the lease at a loss, or else become absolutely liable for the amount of the consideration, but his obligation was fulfilled when he worked the mine sufficiently to show that it could not be worked at a profit. And where the assignment contained no provision against subletting, the assignee by reassigning the lease did not violate his contract nor put it out of his power to comply with it so as to make him absolutely liable for the amount of the consideration.

Appeal from the District Court of El Paso County.

Messrs. GUNNELL, CHINN & MILLER, for appellant.

Mr. H. McGARRY and Mr. J. C. HELM, for appellees.

GUNTER, J.

There is no substantial conflict in the evidence. Appellees, sublessees of certain mining property for a term—July 15, 1895, to February 8, 1896—made, with the consent of their lessors, the following assignment of their sublease.

“Victor, Colo. * * * This agreement made
* * * by * * * James Portland and Matt. Mul-

ligan of the first part, and F. T. Caley, of the second part, in consideration of * * * one thousand dollars in hand paid, and * * * fifteen hundred dollars to be paid as hereinafter specified, do * * * hereby sell, * * * unto the said F. T. Caley all the right, title, claim, interest of, in and to the mining claim and lease hereunto attached. The said F. T. Caley agreeing to work said claim and to pay said Mulligan and Portland the said amount of fifteen hundred dollars out of the net proceeds of the said claim, they to have the full net proceeds until said sum of fifteen hundred dollars is paid in full to them.

“Witness our hands and seals this 20th day of August, 1895.

“JAMES PORTLAND, [SEAL.]

“MATT. MULLIGAN, [SEAL.]

“F. T. CALEY. [SEAL.]”

The assignee, appellant, went into immediate possession and with reasonable diligence and skill mined the demised premises until December 19, 1895, when he stopped operations and sold the mining machinery and tools and rights in the sublease to one Wolcott, who had become assignee of the original lease. Wolcott paid appellant for the machinery, tools and assignment \$2,500, and agreed as a further consideration to pay appellees whatever sum—not exceeding \$1,500—he might realize net from the operation of the mine. He worked the property during the remainder of the term of the sublease without net returns. Appellant during the four months he worked the property lost several thousand dollars in his operations.

There was no evidence that the property covered by the sublease could have been operated at a profit had it been mined with reasonable diligence and skill during the life of the sublease assigned to appellant. There was affirmative evidence that even though so mined the operations would not have been at a profit.

Two days after the expiration of the sublease—assigned as stated to appellant, and by him to Wolcott—appellees sued appellant for the \$1,500, nominated in above agreement of August 20.

From the foregoing facts it appears that appellant operated this property with skill and diligence during four months in his effort to secure net returns at a loss of several thousand dollars. He then, about seven weeks before the expiration of the sublease, quit work, and assigned his interest therein to Wolcott, who, during the remainder of the term continued to work the property with skill and diligence, resulting in failure to obtain net proceeds.

Appellees constructed their complaint, tried the case below and secured judgment for the full amount claimed upon the theory that appellant by assigning the contract on December 19, violated it in that he put it out of his power to comply with the contract, and thereby became liable absolutely for the \$1,500, stipulated to be paid out of the net proceeds of the mine.

This theory is relied on here to sustain the judgment below. This contention in practical results amounts to this: Although appellant had reasonably shown by mining the leased property during four months of the sublease that it could not be operated at a profit; that further operations would be attended with further loss to him, and no benefit to appellees, and although it appeared that appellees were not in any degree damaged by his cessation of work, yet, by his merely stopping work and assigning the sublease he was liable to appellees in the sum of \$1,500, damages they never sustained. We think such is not the law. The principle upon which damages are awarded in actions for breach of contract is that of compensation to the injured party. A reasonable construction must be put upon the contract of August 20, between appellant and appellees, and it was so con-

strued at the former hearing in *Caley v. Portland et al.*, 12 Colo. App. 397, 56 Pac. 350, the court saying:

“The words, ‘The said F. T. Caley agreeing to work said claim,’ do not call for continuous working. All that they did require was a reasonable amount of work with reference to the object to be attained, to wit, the extraction at a profit of ores from the territory.”

C. F. & I. Company v. Pryor, 25 Colo. 540, 549, 550, is pertinent. There the premises were demised for coal mining purposes, and the lessee covenanted to work the same. This it failed to do. The lessor sued and recovered damages upon the alleged breach of the contract to operate the mine. The judgment was reversed because the evidence failed to show that the mine could have been worked at a profit. The court *inter alia* said:

“By the transaction the lessor expected to receive compensation in the way of royalty, and the lessee profits from the operation of the leased premises as a coal mine; so that the benefits thus realized would be mutual. Unless coal was found of a merchantable grade which could be produced at a reasonable profit, or if that discovered was valueless, to require the lessee to mine it and pay royalty on the production would impose a burden without any benefits in return. The obligation was imposed upon the lessee to open the premises as a coal mine, and operate them as such, but in the absence of an express provision in the lease regarding what conditions should exist before a penalty would attach for a failure to observe this obligation, or under what circumstances it should comply with this provision, the law presumes that the parties to the lease, at the time of its execution, considered the purpose for which it was executed and the conditions under which it would be mutually beneficial to carry out its terms

and provisions, and, therefore, intended by the language employed to contract accordingly.—2 Parsons on Contracts, *499. The right to mine having been granted, the law implies that the lessee should exercise reasonable diligence in working the mine—Koch's Appeal, 93 Pa. St. 434; but unless coal actually existed on the premises of a merchantable grade which could be produced at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease it would be under no such obligation."

Under these authorities appellant was not required to work the leased property continuously, but to make a reasonable effort to mine it at a profit. Having made such effort, and having reasonably shown that it could not be worked at a profit within the life of his sublease at the time he quit work and made the assignment he had satisfied the requirements of the contract, and hence was not liable in damages for the cessation of work or assignment of the contract. Further, as the only alleged breach of the contract relied on for recovery is the assignment of the sublease by appellant to Wolcott, if the contract was assignable no breach of the contract was proven and the case must be reversed. This point was ruled in *Caley v. Portland et al.*, *supra*. The court in speaking of the assignment of the sublease on August 20, said:

"The assignment contained no provision against subletting, and there was nothing in it nor the character of the work to be performed to indicate that the contract of assignment involved any relation of personal confidence such as to justify the conclusion that there was an intention of the parties that the work should be performed only by the defendant (Caley). Covenants against underletting are not to be presumed; in fact, they are not favorably re-

garded by the courts, and are construed liberally in favor of the lessee.—Wood's Landlord and Tenant, § 321."

While such portion of the opinion was perhaps not essential to a decision of the point upon which the case turned, yet, it expressed the law. We think the contract was assignable; if so, its terms were not violated in making the assignment by appellant to Wolcott.

The judgment should be reversed.

Reversed.

No. 2192.

THE UNION CASUALTY AND SURETY COMPANY V.
MONDY ET AL.

18	395
18	400
18	395
20	396

1. Accident Insurance—Evidence—Statements of Deceased—Res Gestae.

In an action upon an accident insurance policy where death is alleged to have been caused by accident, an injured condition being shown by other evidence, the cause of the injury can be shown by the statements of the deceased injured party provided such statements constitute part of the res gestae.

2. Same.

In an action upon an accident insurance policy where the evidence showed that deceased was a porter on a sleeping car, that the train came to a sudden and violent stop and immediately thereafter deceased was seen standing at a berth partially made down, his head between his hands, complaining of great pain; that he was put to bed and remained there until he arrived home three days thereafter where he went to bed and was under the care of a physician until his death about twelve days thereafter; that an autopsy disclosed a congested condition of the brain from which he died; that he was a strong healthy man with no symptoms of disease from which the congestion could arise—the statement of the deceased made at the time he was discovered standing at the berth with his head between his hands, to the effect that the berth had fallen and struck him on the head, was admissible in evidence to show the cause of the injury.

3. Accident Insurance—Condition of Policy—Visible Mark of Injury.

A provision in an accident insurance policy to the effect that

it does not cover any injury of which there is no visible mark upon the body does not limit the insurance contract to external injuries inflicted upon the surface of the body, but applies as well to internal injuries discoverable and visible upon examination of the body whether such examination be made before or after death.

4. Accident Insurance — Notice of Injury — Proof of Death — Waiver.

An accident insurance policy provided that immediate written notice must be given the company of an injury and that affirmative proof of death must be furnished to the company within two months from the time of death. Insured was confined to his bed from the time of the injury till his death about two weeks, part of the time being unconscious. Three days after his death notice of the accident was given the company's general agent on a blank form furnished and filled out by the agent. The representative of deceased called on the agent several times for blanks for making proofs. The agent requested him to delay the matter assuring him that the rights of the beneficiaries should not be prejudiced. After two months had expired the company furnished the representative the blanks upon which proof was made. No objection was ever made that notice was not given in time nor that the proof of death was furnished too late, until the company filed its answer to the suit on the policy. Refusal of payment was made on the ground that the deceased died a natural death. Held, that the company had waived objection to the failure to give notice and furnish proofs in the time required.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. MILTON SMITH,
for appellant.

Messrs. DINES & WHITTED and Mr. J. G. Mc-
MURRY, for appellees.

GUNTER, J.

This was an action upon a policy of accident insurance by the guardian of infant beneficiaries resulting in verdict and judgment for plaintiff. Defendant appeals. 135 errors are assigned. All of which we have considered, but discuss only those

which counsel apparently consider most important, and which we regard so.

The complaint alleges that insured in discharging his duties as porter upon a sleeping car was accidentally struck upon the head by the falling of a berth, and from the injuries so sustained died.

These allegations the answer denies.

1. Defendant contends that there is no evidence of the principal fact, that deceased was injured, except his statements made to witnesses Carter and Stafford after the alleged injury, and that such statements were inadmissible, being, as it contends, hearsay. The rule under which the admissibility of such testimony is determined is that if the principal fact—an injured condition—is shown by other evidence the cause of the condition can be shown by the statements of the deceased injured party, provided such statements constitute a part of the *res gestae*.

Insurance Company v. Mosley, 8 Wallace 397, was upon an accident policy. Plaintiff insisted that the insured died in consequence of an accidental fall. Defendant that his death was caused by disease. Mrs. Mosley, plaintiff and surviving wife, testified that insured got up between twelve and one o'clock at night and went out; she did not know how long he was gone; when he came back he said he had fallen down the backstairs and almost killed himself; his voice trembled; he complained of his head; appeared faint and vomited; she was up with him all night, he complained and appeared to be in great pain.

The son testified that he slept in the lower part of the building occupied by the father, at about twelve o'clock of the night mentioned he saw his father lying with his head on the counter and asked what was the matter. He replied that he had fallen down the back stairs and had hurt himself very badly.

These statements as to the cause of the injury

were objected to. No one heard or saw insured fall; there were no cuts or bruises upon the body. These statements were the only evidence of the cause of the injury. The reception of the evidence below was sustained on appeal, the court saying:

“Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below.

“In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive.”

The doctrine announced in this case has not been repudiated by the eminent tribunal which declared it, and it has been frequently approved. Among the cases see: *Northern American Accident Asso. v. Woodson*, 64 Fed. 689; *Ry. Co. v. Ashley*, 67 Fed. 209; *Ry Co. v. Anderson*, 82 Tex. 516; *Leahy v. Ry. Co.*, 97 Mo. 167; *Lindenburgh v. Crescent Mills* (Utah), 33 Pac. 692.

The principal fact here was the injured condition of the insured. There was evidence of this other than his declarations made to the witnesses Carter and Stafford. He was a sound, healthy man, discharging his duties as porter. The train entering

the town of Davisville made a sudden, violent and unusual stop, the jar resulting to passengers from the stop being so violent as to alarm them. Immediately thereafter insured was seen standing at a berth partially made down, his foot upon the stepping stool, his head between his hands and in great pain. He continued in great pain, his face and complaints showing pain. His head was tied up with a wet towel, and in his suffering he was put to bed in the smoking room. This was the night of October 26. He remained in bed in the car sick and suffering until he arrived at home (Denver) October 29. He there went to bed, called a physician, and remained under his care until death, November 11. An autopsy was then made showing a congested condition of the brain on the right side, and that from this he died. He was found to have been a strong, healthy man; every organ even in death was healthy and in good condition. There was no symptom of any disease from which the congested condition of the brain could arise. Dr. McNaught, who attended the insured continuously after his arrival in Denver, and who participated in the autopsy, testified that the probable cause of the congested condition of the brain was an injury. These facts showed that insured was suddenly changed from the state of health to one of sickness and pain; they showed the principal fact, the injured condition of the insured. The evidence showing the injured condition was as strong as that showing the injured condition in the Mosley case. In neither case did any party see the accident. In neither case were there bruises or cuts upon the body. In each case the injured condition was proven by the suffering, the actions of the party, and the results of the condition.

The injured condition having been shown, any statements made by the insured explanatory of the

cause, which were a part of the *res gestae*, were admissible for that purpose.

In this case the witness Carter found insured injured and in pain, and inquired of him "What is the matter with you Dave? In a very faint voice he said, 'I was getting down this berth and it came down and struck me in the head, * * * .' I think he said his foot slipped, or something like that, he said something about the berth coming down and his foot slipping, I think he said, and before he could recover himself the berth caught him and struck him." This statement, introduced for the purpose of showing the cause of the injury, appellant contends should have been rejected as hearsay.

The statement was made by deceased at the scene of the accident, immediately thereafter, unaffected by any disturbing cause intervening between the accident and the statement. Apparently it was unmediated, and the natural spontaneous expression of the deceased, issuing directly from, and produced solely by the accident, and its results. No reason appears for rejecting it as a statement concocted by deceased in his own behalf; apparently it was a natural, unbiased truthful statement given in explanation of his then injured condition and pain.

The law applicable to this class of testimony is stated in *Pueblo Building Co. v. Klein*, 5 Colo. App. 348, 354, 38 Pac. 608. (Approved, *Herring v. The People*, 28 Colo. 23, 28.)

"The declaration offered in evidence must be either contemporaneous with the principal fact, or its natural and spontaneous outgrowth. It must be instinctive, unmediated utterance of the party while the impression produced by the event has full possession of the mind. The connection between the statement and the fact must be such that the one is the evident interpreter of the other. Their relation

to each other must be that of immediate cause and effect. When the two are thus connected, it does not matter that there is an appreciable lapse of time between them. Notwithstanding such lapse, the one is a continuation of the other, and both are parts of one transaction. But if there is a severance of the connection, if the transaction, so far as the person speaking is concerned, is at an end before the declaration is made, the two are distinct, independent of each other, and it is immaterial how minute the interval which separates them. The utterance then proceeds from volition, and the speaker is not the mouthpiece of the event.—See 1 Wharton on Ev., § 259; 1 Greenleaf on Ev., §§ 108, 110.”

It would serve no useful purpose to attempt a review of the many authorities discussing this principle of evidence and applying it to the varying facts presented by the cases. We are clear that this evidence was properly admitted. Upon the same principle the statements made to deponent Stafford were properly received.

2. The policy provided: “This insurance does not cover * * * any injury fatal or otherwise of which there is no visible mark upon the body.” Appellant contends that there was no evidence of a visible mark of the alleged injury upon the body of deceased. The jury in effect found that deceased was accidentally struck upon the head by the falling of an upper berth of a sleeping car, and that the injury so produced was the cause of his death. It was the purpose of defendant in issuing this policy, and the purpose of deceased in taking it out, to have the policy cover accidents of the character of the one here involved. The purpose of the provision of the policy thus cited was not to exclude accidents of the character before us, but to prevent the defendant from being imposed upon by fictitious accidents

claimed to be within the policy. If the accident was intended by the parties to be within the policy such a strained construction should not be put upon it as to exclude the accident and defeat the intention of the parties. The policy of the courts is to give a liberal construction to such provisions in favor of the insured.—*Travelers Ins. Co. v. Murray*, 16 Colo. 296, 305; *U. S. Mutual Ac. Assn. v. Newman*, 84 Va. 52, 59.

In *Mutual Accident Association v. Barry*, 131 U. S. 100, 111, the policy provided that it should not extend to any injury of which there was no external and visible sign. The trial court in charging said:

“It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury.”

The insured sustained duodenitis by jumping

from an elevated platform. The external and visible signs of bodily injury were that he was ill immediately after the injury, distressed in the stomach, vomited, and from that time retained nothing on his stomach, passed nothing but decomposed bloody mucus, and died nine days thereafter. By sustaining the recovery below, the upper court held these to be external and visible signs of bodily injury.

In *Pennington v. Pacific Mutual Life Ins. Co.*, 85 Ia. 468, 470, plaintiff, a locomotive fireman, while on duty, was violently and accidentally injured by the lurching of a locomotive. He recovered upon an accident policy. This provided, "The insurance shall not cover * * * injuries of which there is no visible external mark upon the body of the insured." The injury sustained was a strain. It was contended the accident was without the policy because there was no visible mark of the injury upon the body. The court held, "The contract does not contemplate that there must be bruises, contusions or lacerations on the body, or broken limbs." An effect of the strain was the disabled condition of insured. It was held that this was a visible, external mark of the injury upon the body of the insured.

In *Freeman v. Mercantile Accident Asso.*, 156 Mass. 351, the policy provided, "That benefit under this certificate shall not extend to any case in which there shall be no symptom or visible sign of bodily injury." The insured died of peritonitis localized in the region of the liver. The trial court was asked by the defendant to charge there must be an external sign of the bodily injury. This it declined to do and charged that if there were symptoms or signs which would become visible, and did become visible, upon examination by being able to inspect the interior of the body, it would be sufficient whether that examina-

tion was made before or after death. This was approved by the upper court.

Thayer v. Standard Life and Accident Insurance Company, 68 New Hampshire 577, was upon an accident policy; recovery by plaintiff. The facts being plaintiff's shoulder was accidentally injured by a fall causing pain and depriving him of the use of the arm. He was disabled thereby from attending to business. The policy provided that it should not cover "any injury fatal or otherwise of which there is no visible mark upon the body." Construing this provision, the court said:

"The visible mark upon the body required by the policy need not be a bruise, contusion, laceration or broken limb, but may be any visible evidence of an internal strain which may appear within a reasonable time after the injury received."

In *U. S. Mutual Accident Asso. v. Newman*, 84 Va. Rep. 52, 54, 62, the policy provided, "That benefits under this certificate shall not extend to any bodily injury of which there shall be no external visible sign upon the body of the insured." It was held that death of the body was an external and visible sign of bodily injury upon the body of the insured.

We think death of the body of the insured was a visible mark of injury upon the body within the meaning of the policy. Further, there was evidence of a localized redness of the tissues of the brain of deceased on the right side of the head. This was not revealed until the autopsy. This we think was a visible mark upon the body as provided in the policy. The terms of the policy did not require that the visible mark should be upon the surface of the body.

3. The policy provided, "Immediate written notice must be given said company * * * of any accident and injury for which a claim is to be made with full particulars thereof, and full name and ad-

dress of assured. Affirmative proof of death must also be furnished to said company within two months from the time of death."

Assured was injured October 26, at Davisville, California, so seriously that he immediately gave up his work as porter, went to bed in his car, was taken therefrom to his home in Denver on arrival of the train there, and was confined to bed almost continuously until death November 11; much of the time in an unconscious condition. November 14—three days after death—notice of the accident was given to appellant's general agent on a blank form furnished and filled out by him,—printed thereon appearing: "In case of accidental injury, or death, immediate notice with full particulars should be given on this blank to Charles D. Brooks, Bank Building, Denver, Colorado," which notice, after signature by the representative of beneficiaries under the policy, was sent by the agent to defendant at St. Louis, and received there November 17. No objection was made to the notice not being in time until in defendant's answer herein.

During November and December, Cowell, representative of the beneficiaries, called on agent Brooks several times for blanks for making proofs of death. Brooks never complained that the notice of accident was not in time, or said that the proofs would be useless, on the contrary, he promised to furnish the blanks, and told Cowell to feel no uneasiness, that the claim would be settled. February 3, he wrote Cowell, "Referring to our conversation this morning requesting you to delay matters regarding the death of D. H. Mondy until I could hear from St. Louis, I desire to say, by doing so, you will not in any manner prejudice the rights of the beneficiaries under this policy, and the request is made for the purpose of being fully informed from St. Louis regarding this

Company's position, that I may properly advise you. Yours truly, C. D. Brooks, General Agent."

Finally the company sent Brooks the blanks. He gave them to Cowell, February 16, saying they were in response to his request. Cowell made proofs, delivering them to Brooks March 2, who forwarded them to the home office. No objection was made by the company, or by Brooks, that the proofs were too late. The claim later was declined on other grounds, the letter of rejection is as follows:

" * * * Mr. Harry Cowell, Administrator. Dear Sir. My company has after careful consideration of the claim made upon it on account of the death of D. H. Mondy instructed me to notify you that upon the evidence and statements secured in this case it is apparent that Mr. Mondy died a natural death, * * * under the circumstances it is my unpleasant duty to advise you that this claim is formally disallowed for the reasons set forth. Yours truly, C. D. Brooks, General Agent."

It is thus seen that the defendant notified of the accident November 14, furnished blanks upon which to give notice thereof, aided in filling out the blanks, and received the notice when prepared without complaint that it was in too late. It is also seen that without any suggestion that the notice was too late, the defendant promised to furnish the blanks for proof of death, and when dilatory in furnishing the blanks wrote above letter of February 3. After much delay the company did furnish blanks for the proofs of death. They were filled out and delivered to defendant without objection to their being after time. Finally the claim was rejected by defendant without complaint that either the notice of the accident, or that the proofs of death came too late. It first made such objection in its defense to this action. The authorities justify the conclusion that such

course of the company waived the requirements of the policy that immediate notice should be given of the accident and that the proofs of death should be furnished within sixty days.

Peabody v. Accident Association, 89 Me. 96, was upon an accident policy. October 19, plaintiff met with an accident causing injury. The policy required the company should receive written notice of the accident within ten days after its occurrence. November 2 written notice was sent, but not received until after the ten days had expired. Upon receipt of the notice the company sent plaintiff a blank containing questions to be answered as first proof of loss, with request to return within seven days. Plaintiff filled out the form answering all inquiries, and sent the same to the company. In November, the company forwarded to plaintiff another blank form to be used in making further and apparently final proof of loss. No other communication between the parties until March 27, when a representative of the company called upon the plaintiff and subjected him to a personal examination. March 28 the company advised plaintiff that it had decided to reject his claim. The court said:

“Did all these acts taken together in effect constitute a waiver by the company of a merely technical forfeiture created by its receiving the notice of injury a few days later than was stipulated in the contract? We think that by deciding this question affirmatively we shall reach a just and equitable conclusion. * * * There are many cases which recognize the principle that when an insurance company accepts or assists in preparing second proofs of loss it thereby waives any defects in the first proofs.”

Trippe v. Provident Fund Society, 140 N. Y. 23. was upon an accident policy. This required notice of the accident to be given within ten days from its hap-

pening, and prescribed that failure to do so should invalidate all claims under the policy. The accident occurred August 22. Notice was served September 2, and retained by defendant without objection. Another was served the 15th of October. October 12, defendant, upon written application, furnished necessary blanks for proofs of loss. The proofs were made and forwarded to defendant in compliance with the terms of the contract and were retained without objection. March 19 defendant called for further information, which was given. Defendant sought to avoid the policy upon the ground that the notice was not given within the ten days provided. The court declined to sustain the defense and in ruling said:

“It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured by virtue of the contract to do some act, or incur some expense or trouble inconsistent with the claim, that the contract had become inoperative in consequence of a breach of some of the conditions. * * * The acts of the defendant in receiving and retaining these papers without objection, and calling for others, are consistent only with the theory that the contract was still considered in force, and as the plaintiff acted accordingly in performance of its conditions, subsequent to the loss, the defendant ought not to be permitted now to change its position and assert that after ten days from the accident the obligations of the policy virtually ceased by reason of failure within that time to serve notice of death.”

In *Goodwin v. Mass. Mutual Life Ins. Co.*, 73 N. Y. 480, 493, proofs were not furnished within the time prescribed by the policy. When furnished they were received without objection, and the refusal to pay the amount provided in the policy was based upon other grounds. *Inter alia* the court said:

“They sent their blanks to the plaintiff for making out such proofs, induced the plaintiff to employ experts for the purpose of determining whether the policy had lapsed; did not return her the proofs after they were received, upon the ground that they were not received in time, but kept them, and encouraged and induced the plaintiff to bring an action to recover the amount insured. Their acts were not only a waiver of the failure to present the proofs within the time prescribed, but present all the necessary requisites of an estoppel against any such defense. They were decisive and explicit acts, showing that no objection was interposed to the time of furnishing the proofs, and entirely conclusive upon that question. That they transpired after the time had expired does not detract from their effect or render the waiver any less emphatic and decisive. The doctrine that there must be a new consideration after the time has elapsed for the presentation of proofs to constitute a waiver has never been upheld by this court, and it has not yet been held that the principle of estoppel, in so restricted a sense, is to be applied to cases of this character.”—See also *Sheldon v. Nat. Masonic Accident Asso.*, 122 Mich. 403, 29 Ins. L. J. 488; *Moore v. Wildey*, 176 Mass. 418, 29 Ins. L. J. 798; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263.

A review of the evidence in this case is convincing that the plaintiff was entitled to verdict and judgment below. No error prejudicial to defendant intervened in the trial. The judgment should be affirmed.

Affirmed.

[No. 2259.]

18 409
20 404

THE COLORADO DRY GOODS COMPANY v. W. P. DUNN
COMPANY.

1. Appellate Practice—Findings of Trial Court—Written Evidence.

The rule that the appellate court is concluded by the find-

ing of the trial court on conflicting evidence does not apply where the evidence is in writing.

2. Sales—Warranties—Evidence—Burden of Proof.

In an action for the price of goods purchased by a written contract or order where defendant answered that the goods were purchased upon certain representations and warranties which were not true, and the written evidence of the contract discloses no such representations or warranties, the burden is upon the defendant to prove them.

3. Same.

Plaintiff sold to defendant for advertising purposes a number of copies of a picture beneath which was printed "The War Congress of the United States of America." It contained the portraits of all the members of the house of representatives elected at the general election to that congress. Six of these members had died before the war resolutions were passed. It was not shown whether or not their successors had been elected prior to the passage of the resolution. None of these successors were included in the picture. Held, that there was no breach of warranty that the picture contained all the members of the house at the time war was declared.

Appeal from the District Court of Arapahoe County.

Mr. I. N. STEVENS and Mr. FREDERICK W. LIENAU, for appellant.

Mr. HARRIE M. HUMPHREYS, for appellee.

THOMSON, J.

The Manhattan Novelty Company was the publisher of an engraving beneath which was printed, "The War Congress of the United States of America." The engraving contained the portraits of three hundred and seventy individuals, and designated them as "Members of House of Representatives, Fifty-Fifth Congress." Connected with this designation were the words, "They Remembered the Maine," and a list of names, purporting to be the names of those members, arranged with reference to the states and districts represented by them. On the 24th day of October, 1898, S. Rosenfield, as

agent for the novelty company, exhibited a copy of this engraving to L. Ransohoff, the manager of The Colorado Dry Goods Company who, after an inspection of it, in behalf of the dry goods company made and delivered to Rosenfield an order of which the following is a copy:

“The Colorado Dry Goods Company,
“Denver, Colo., Oct. 24, 1898.

“Manhattan Novelty Company,
“335 and 336 Manhattan Building,
“Chicago, Ill.

“Gentlemen: We hereby order from you five thousand (5,000) copies of your War Congress Pictures at four and three-quarters ($4\frac{3}{4}$) cents per copy, for which we agree to pay the total sum of two hundred and thirty-seven dollars and fifty cents (\$237.50) within fifteen (15) days from date of shipment, less two per cent. (2 per cent.) off. This order is in consideration of the express terms and agreement made by your representative, S. Rosenfield, that he or any salesman of your firm will not sell any of these War Congress Pictures, purchased by us, to any other merchant or dealer, or agent, in this City of Denver, Colorado, or within twenty-five (25) miles around, for one (1) year from date. You are also to furnish us any more copies we may desire to order, at the same price as above mentioned, with the privilege of ordering in lots of one thousand (1,000) at one time; and also to print on every picture the following name: ‘Compliments of The Colorado Dry Goods Company, Denver,’ to be delivered by November 15, 1898.

“Order given by The Colorado Dry Goods Co., per L. Ransohoff, Manager.

“Order taken by S. Rosenfield, Agent, for Manhattan Novelty Company, Chicago, Ill.”

On the 4th day of November, 1898, the novelty

company sold and assigned the contract to W. P. Dunn & Co., a corporation, which, on November 15, 1898, delivered to the dry goods company five thousand copies of the engraving, pursuant to the terms of the order; but the latter, after having received them, refused to pay for them.

This suit was brought by W. P. Dunn & Co. to recover the agreed price. The defendant answered that it purchased the pictures to be distributed to its patrons free of charge along with their purchases, the free distribution to be offered as an inducement to the public to deal with it; that the order was given on the representation and warranty of the novelty company that the portraits in the engraving represented all the members of the war congress, that is, all the members of the house of representatives of the fifty-fifth congress of the United States, which was in session immediately previous to and pending the recent war between the United States and the Kingdom of Spain, and which passed the war resolutions of the 21st day of April, 1898; that the picture was not what it purported to be, and did not contain the portraits of the members of the war congress; and that, upon the discovery of such fact by some of the defendant's customers, it withdrew the engravings from distribution and notified the novelty company and the plaintiff that it held the engravings subject to their order. The replication put in issue the allegations of the answer concerning representation and warranty.

The case was heard upon an agreed statement of facts, and the affidavits of Mr. Rosenfield, the novelty company's agent, and Mr. Ransohoff, the manager of the defendant; the affidavits being received in lieu of the testimony of those persons. The only portion of the statement of which notice is necessary here was that the picture contained the por-

traits of six members who were elected to the fifty-fifth congress, but who had died before the passage of the war resolutions, and did not contain the portraits of their successors. The affidavit of Ransohoff affirmed, and that of Rosenfield denied, the representations and warranty alleged in the answer. The cause was heard by the court, which gave its judgment to the plaintiff, and the defendant appealed.

For the plaintiff it is said that as the evidence was contradictory, the finding upon it below concludes this court. Such is the rule where the witnesses are personally present and testify at the trial; but there is no such rule where the evidence is in writing.—*Stuart v. Asher*, 15 Colo. App. 403.

In the written evidence of the contract between the defendant and the novelty company we find neither representation nor warranty. It consists simply of an order for the pictures and the acceptance of the order. Whatever representation there was must have been verbal; and, having been alleged as matter of defense, the burden was on the defendant to prove it. But the evidence for and against the allegation was evenly balanced. One affidavit affirmed it and the other denied it; so that it was left as if there had been no proof at all respecting it.

It is argued, however, that on its face the engraving purports to exhibit the portraits of all the members of the House at the time war was declared. The engraving is styled "The War Congress of the United States of America," and it is said that if it includes persons who were not members when the war resolutions were adopted and omits others who were, it is not a representation of the war congress of the United States. But it is entirely consistent with the agreed statement that every man who was a member of the house of representatives at or im-

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mediately previous to the commencement of the war with Spain is represented in the picture. Six members had previously died and, of necessity, they were not present when the war resolutions were passed. No dates connected with their death are given, and it is not said that their places had been filled. The statement that the picture did not contain the portraits of their successors is not a statement, nor equivalent to a statement, that they had successors. The fifty-fifth congress was elected in 1896, and the terms of its members would expire on March 4, 1899. There could be no regular election of their successors until the fall of 1898, a considerable period after the passage of the war resolutions. If the time of their death was not too recent it is possible the vacancies might have been filled by special election before the passage of the resolutions. But it is nowhere said that the vacancies had been filled; and, unless they had, the picture contained the portraits of all the members of the war congress, and the representation was strictly true. That it contained also the portraits of members of the fifty-fifth congress who had previously died and who, consequently, did not participate in the passage of the resolutions, in no manner affected the character of the representation. We find no valid reason for disturbing the judgment, and it will be affirmed.

Affirmed.

April Term, 1903.

[No. 2251.]

IDE ET AL. V. BASCOMB ET AL.

Corporations—Action by Stockholders—Pleading.

An action cannot be maintained by stockholders of a corporation upon a cause of action which was a direct wrong to the corporation itself, unless it affirmatively appears that plaintiffs have made proper effort to induce the directors of the corporation to bring suit in the name of the corporation and that the directors have failed or refused to do so, and also that plaintiffs have exhausted all means within their reach to obtain redress through the stockholders of the corporation, or unless a state of facts be shown which makes it apparent that such effort to induce action by the directors or to obtain relief through the stockholders would be futile.

Appeal from the District Court of Lake County.

Mr. J. E. HAVENS, for appellants.

Mr. JOHN D. FLEMING and Mr. DAVID B. GRAHAM, for appellees.

GUNTER, J.

The Incas Mining Company, a corporation, was organized May 14, 1881, with a capital stock of two million dollars, divided into two hundred thousand shares. Jed H. Bascomb, Wm. Hardin, Mrs. William W. Morrison, James O'Brien, Edward H. Trerice, and John Walsh, owners of the White Prince mining claim, deeded the same to the corporation, and received in return eighty thousand shares of its capital stock. W. S. Ide and his then associates, owners of the Across the Ocean mining claim, deeded to the new company their claim, receiving eighty thousand

shares of its capital stock in return. The remainder of the capital stock—forty thousand shares—was left in the hands of the treasurer as treasury stock. September 27, 1881, W. W. Morrison purchased two hundred and forty shares of the treasury stock. It does not appear what amount, if any, of the remainder of the treasury stock was sold. The only information conveyed by the complaint is by the following extract therefrom:

“Complainants further allege, that of the forty thousand shares of capital stock (the treasury stock) they have no information as to how much of the same was sold, but allege on information and belief, that enough of the same was sold to have paid off any and all indebtedness, that may have at any time been incurred by the defendant company, and that at the time of the institution of the suit by defendant, William S. Ide, more fully hereinafter referred to, there was treasury stock in the hands of the proper officers of said company, which could and should have been used for the payment of any legal or equitable indebtedness against said company.”

The indebtedness of the company is not averred, and there are no facts given from which it can be even conjectured what amount, if any, of this treasury stock, other than the two hundred and forty shares above mentioned was sold.

William S. Ide, J. W. Graham, George W. Allen, Thomas B. McCormack, Walter B. Brooks, John K. Sullivan and Richard T. Clarke were designated in the articles of incorporation as directors, and were still such—according to the averments of the complaint—at the time of the institution of the present suit. September 27, 1890, five persons, W. S. Ide, R. T. Clarke, C. E. Markeson, D. L. Brownsmith, and J. W. Bradshaw, assuming to act as a board of directors of the Incas Mining Company, sitting at

Columbus, Ohio, fraudulently—as it is alleged—authorized the issuance of the following note to W. S. Ide:

“\$1,500.00 Columbus, Ohio, Sept. 27, 1890.

“Thirty days after date, we promise to pay to the order of W. S. Ide, Fifteen Hundred Dollars at the Fourth National Bank of this city, with interest at the rate of eight per cent. per annum, value received.

“The Incas Mining Company,

“By C. E. Markeson, its

“President.”

Default having been made in the payment of the note, suit was instituted thereon by the payee, W. S. Ide, in the district court of Lake county, Colorado, December 12, 1890. Three days thereafter service of the summons was gotten upon one of the stockholders of The Incas Mining Company, John Walsh, and judgment recovered for the principal and interest of the note September 4, 1891. September 15, 1891, certain real estate of the judgment debtor—The Incas Mining Company—was levied on to satisfy the judgment, and sold October 10, 1891, to W. S. Ide; a sheriff's certificate of purchase issued, and on August 16, 1892, a sheriff's deed was made to W. S. Ide.

No one of appellees prior to October 1, 1894, knew of the passing of the resolution purporting to authorize the execution of the note, or of the institution of the suit, or of the recovery of the judgment, or of any one of the steps culminating in the issuance of the sheriff's deed to W. S. Ide.

February 28, 1895, the present action was instituted against W. S. Ide and The Incas Mining Company to set aside the judgment, the certificate of sale, and the sheriff's deed. By agreement of the parties, upon facts immaterial to this ruling, W. H. Ide was substituted for W. S. Ide, one of the original defendants.

The plaintiffs below (appellees) were four stockholders who sued for themselves and all others similarly situated. The case was tried February 5, 1900. Plaintiffs had a decree. Defendants appeal and urge as one of the grounds for reversal, that the action should have been brought by the corporation, and not by its stockholders.

It affirmatively appears from the complaint that the wrongs complained of, the fraudulent note, its merger into judgment, and the sale and conveyance of defendant corporation's lands to defendant W. S. Ide, were direct wrongs to the corporation; that the directorate of the corporation consisted at the time of the institution of the present action of seven members, and has so consisted since the organization of the company in 1881; that only two of them—Ide and Clarke—were in any wise connected with the alleged wrong. No request was made of this directorate, or any of its members, nor was any effort made through the directors to have an action instituted in the name of the corporation to redress the alleged wrongs. The only explanation offered why this was not done is the following allegation of the complaint:

“And your complainants further represent and allege, that of the seven directors, first selected to manage the affairs of said company for the first year, none of the same were owners of the White Prince mine aforesaid, but were entirely selected from the owners of Across the Ocean lode mining claim, or because of their friendship to and for said Ide. And that two of the same, viz.: Defendant Ide and Richard T. Clarke, are of the board of directors, who have been assuming to act in Columbus, Ohio, as the directors of said company, and that a majority of said board, provided for in the articles of incorporation, complainants fear, might if notice were given them, co-operate with said Ide, and those who have been

assuming to act, and that it would be impracticable and dangerous to complainants' rights, as well as unavailing, for complainants to ask the parties, who have been assuming to act as and for said company, to join with complainants in this suit."

The reasons as we understand this paragraph assigned for not making application to the board are, that its members were selected in 1881, from the owners of the Across the Ocean lode mining claim, or because of their friendship for said Ide. No fact is stated why having been owners of the lode mentioned would cause them to violate their duty as directors, and countenance the alleged fraud against the corporation of which they are trustees. Nor is any fact alleged from which we are justified in concluding that their friendship for Ide in 1881, would prevent them from doing their duty as directors in 1895.

It is further alleged in the above paragraph that appellees feared if notice were given of the intended suit, it would be dangerous to their rights. The mere fact that appellees entertained this fear does not justify us in concluding that grounds existed for it. The facts upon which such fear is grounded are not alleged. There are no allegations in the complaint of an application to the stockholders of appellants to take steps to right the alleged wrong. There are no allegations explaining why an application was not made to the stockholders. The capital stock of the company consisted of two hundred thousand shares. Eighty thousand shares were issued, as above stated, to the owners of the White Prince mining claim. Eighty thousand shares issued to "Wm. S. Ide, and his former associates in the Across the Ocean lode mining claim." We have no definite information as to the disposition made of the forty thousand shares left as treasury stock, except as to the 240 shares sold to William M. Morrison, one of appellees. It

thus appears that eighty thousand shares of the issued stock were at the time of the institution of this suit in the hands of the former owners of the White Prince mining claim; 240 shares owned by William M. Morrison, one of appellees. As it does not appear that more than eighty thousand other shares had been issued, we assume for the purpose of this ruling, that only one hundred and sixty thousand, two hundred and forty (160,240) shares of stock of the company were outstanding at the time of the institution of this suit. These last mentioned eighty thousand shares were issued in 1881, to appellant Ide, and his then friends. What were the relations between Ide and these friends at the time of the institution of this suit we are not advised. Where and in what amounts this stock was held at such time the complaint does not allege. It is not alleged in the complaint that some of these last mentioned stockholders would not have co-operated with appellants to right the frauds alleged in the complaint, nor are facts alleged from which it appears that they would not have done so. To sum up, no request was made of the directors to take this proceeding. No excuse is offered for the failure of appellees to do so. No request was made of the stockholders to hold a meeting and remove the directorate, or take steps for a righting of the alleged wrong, nor is any explanation offered in the complaint for not having requested the stockholders to act. So far as we are advised by the complaint, all of the stockholders except Clarke and Ide, might have co-operated in efforts to redress the wrongs complained of. The complaint does not inform us the number of shares of stock held by Clarke and Ide. Knowledge of the wrong was had October 1, 1894; this suit was not instituted until practically five months thereafter, and yet during this interval there does not appear to have been any effort made to induce corporate action, and

so far as the complaint advises us, longer time might have been taken if necessary to obtain corporate action to redress the wrongs, without prejudice to the rights of the corporation.

“Where the complaining shareholders do not sue to redress grievances peculiar to themselves, but proceed *in right of the corporation*, or, what is the same thing, *in right of all shareholders*, then the failure or refusal of the corporation itself to demand redress is a condition precedent to the right of the shareholders to sue or to appear as plaintiffs, unless a state of facts is alleged and proved which makes it apparent that such a demand would be futile.”—Commentaries on the Law of Corporations, Thompson, vol. 4, § 4500.

In *Foss v. Harbottle*, 2 Hare 461, the bill was by two shareholders of the company suing for themselves and all other shareholders except the defendants. The defendants were five directors, one shareholder—not a director—and the solicitor and architect of the company. The charge was the fraudulent misapplication of assets of the company. The prayer of the bill was that defendants might be decreed to make good the shortage to the company arising from the act complained of. The appointment of a receiver to wind up the affairs of the company was also prayed. In ruling, the court *inter alia*, said:

“The possibility of convening a general meeting of the shareholders for the purpose of considering the acts of the board of directors, was not, however, excluded by the allegations of the bill; and it was held that in the absence of such an averment plaintiffs could not maintain the action * * * as under the circumstances there was nothing to prevent the company in its corporate capacity from obtaining the redress asked by the plaintiff.”—Approved *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46.

In *Miller v. Murray*, plaintiff owned three hundred and thirty shares of capital stock of The Denver Fire Brick Company, organized under the laws of Colorado by plaintiff Murray, and defendants Schwartz and Lynn, and one Sheik. The par value of the capital stock of the company was fixed at one hundred thousand dollars, of which thirty-three thousand was paid in by the plaintiff Murray, his wife and daughter. Thirty-one thousand by defendants Schwartz and Lynn, and twenty-one thousand by Sheik. The remaining fifteen thousand in stock was held in trust for the company and never sold. Sheik was manager of the company, and defendant Miller acting clerk. In 1886 a board of directors was elected and Miller was made director, secretary and general manager of the company. In May, 1887, there was outstanding against the company, in addition to an indebtedness of fifteen thousand dollars, and accrued interest secured by a trust deed on the property. a further indebtedness of five thousand dollars secured by a second trust on the property. In 1887 the company's property was sold under the second trust deed to one Keener, who soon thereafter transferred the same to defendant Miller, who secured a release of the first trust deed. Miller organized a new company adding the word "manufacturing" to the name of the old company, calling the new company "The Denver Fire Brick Manufacturing Company." Thereupon Miller conveyed the property to the new company which elected a board of directors, and Miller was made president. The action was by Murray as stockholder of the old company, to set aside the sale to Miller and the new company, upon the ground that the purchase by Miller was fraudulent, and in violation of his trust as a director of the old company. Schwartz, president of the company, and Lynn, vice-president, were both charged with conspiring with

Miller. The defendants were Miller, the late company, its board of directors elected in 1886, the new company, and its board of directors, and the mortgagees, Crippen, Lawrence & Company. The plaintiff had a decree which on appeal was reversed, the court holding that a majority of the stock of the old company was held by plaintiff, and those acting with him; that they could have held a meeting of the stockholders, removed the old directors, and have elected a directorate that would have ordered the suit in the name of the corporation, and that, therefore, it was not necessary to institute the suit in the names of the stockholders. In the course of the opinion it is said:

“Among other requisites of a bill of this nature, in addition to the grievances which would warrant this kind of relief to the company, it was held that before the shareholder could be allowed to conduct a litigation he should satisfactorily show that he had exhausted all the means within his reach to obtain, within the corporation itself, redress of his grievances. In addition to making an earnest effort to induce the managing body of the corporation to seek relief, he must further show, if he fails with the directors, that he has made an honest effort to obtain relief through the stockholders as a body, if time permits or has permitted him to do so. And if this be not done he must show cause why it could not be done or that it would be unreasonable to require it.”

As stated in a number of the authorities, “to maintain such a suit the stockholder must be able to show that otherwise there will be a failure of justice.”

—*Miller v. Murray, supra.*

In *Morgan v. King*, 27 Colo. 539, 551, it is said: “The usual rule is, that an action cannot be maintained by stockholders on behalf of the corporation unless it appears that the party bringing the action

has exhausted the means of putting the corporation in motion.”

In *Hawes v. Oakland*, 104 U. S. 450, the action was by a shareholder in the Contra Costa Water Works Company, in behalf of himself and other shareholders, against the city of Oakland, The Contra Costa Water-Works Company, and its board of directors, to right a wrong to the corporation in furnishing to the city of Oakland an excessive amount of water, to the prejudice of plaintiffs and other stockholders. Relief was denied because it did not appear affirmatively that proper effort had been made by the shareholders to induce corporate action. In the course of the opinion the court said:

“The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity * * * .”

The reason of the rule requiring an earnest and reasonable effort to induce corporate action to be pleaded and proven before the stockholder can maintain an action to right a direct wrong to the corporation is thus stated in *Miller v. Murray, supra*:

“The vast and increasing importance of the business transacted by corporations and the immense number of stockholders in many of these companies, require that courts should closely scrutinize actions brought by stockholders where the cause of action is primarily one belonging to the company. If it be once conceded that such companies may be embarrassed and subjected to cost and expense by every stockholder who thinks he has a grievance, the usefulness of corporations would be seriously crippled. Corporations can act only through agents and officers appointed for that purpose in pursuance of the statute. Every stockholder knows this when he pur-

chases his stock, and it is not unreasonable to require him to seek redress for his grievances through the company, or to show some reason why he does not do so. In the absence of such a showing he ought not to be allowed to maintain an action as a stockholder, where the right of action properly belongs to the company."

In Commentaries on the Law of Corporations, vol. 4, Thompson, § 4500, it is said:

"The reason is that if every shareholder were allowed to bring such suits at pleasure the directors might find themselves harassed by a multiplicity of suits, and by endless litigation. The principle is, that the stockholder or stockholders seeking to maintain the action must show that they have used in good faith reasonable efforts to obtain redress at the hands of the corporation."

When the principles of law so announced are applied to the facts appearing from the complaint herein, it fails to state a cause of action. It does not there affirmatively appear that appellees used reasonable efforts to obtain redress at the hands of the corporation before instituting this action.

We have not considered the other grounds urged for a reversal, and intimate no opinion as to them.

Judgment reversed with instructions to the lower court to permit plaintiffs to amend their complaint as they may be advised.

Reversed.

Maxwell, J., not sitting.

[No. 2184.]

FLINT AS ASSIGNEE OF THE ARAPAHOE PAPER COMPANY, ET AL., V. POWELL AS RECEIVER OF THE ARAPAHOE PAPER COMPANY.

Receivers—Assignment for Benefit of Creditors—Jurisdiction.

A receiver appointed by the district court to take possession of the assets of an insolvent defendant is entitled to administer

such assets in preference to an assignee under an assignment for the benefit of creditors made by said defendant pending the action in which the receiver was appointed and prior to his appointment, but after the court had acquired jurisdiction in the action for his appointment by the filing of the complaint and service of summons.

Appeal from the District Court of Arapahoe County.

Mr. ROBERT W. BONYNGE, for appellant, Myron C. Flint, as assignee of The Arapahoe Paper Company.

Mr. GEO. C. PRESTON, for appellant, The Arapahoe Paper Company.

Mr. A. J. RISING, for appellee.

Messrs. BICKSLER & McLEAN, of counsel.

GUNTER, J.

August 21, The Carpenter Paper Company filed a complaint in the district court against The Arapahoe Paper Company, a corporation, wherein two causes of action in debt were stated, and wherein certain matters were alleged for the purpose of securing the appointment of a receiver in aid of the main action, and thereon same date, an order went appointing a receiver of the assets of defendant.

August 22, defendant moved and secured an order vacating the appointment of the receiver. Same date plaintiff filed an amended complaint and petition for the appointment of a receiver, summons issued and personal service secured August 23. August 24, defendant made an assignment to appellant of all its assets for the benefit of creditors. August 29, the cause came on for hearing a second time on the application of plaintiff for the appointment of a receiver, and the court vacated the order of August 22, discharging the receiver, reinstated the one of August 21, appointing a receiver, and further or-

dered that the present receiver be substituted for the one designated August 21. The receiver thus appointed qualified, as did above assignee. The assignee, under our statute, became an officer of the district court, and as such was required to administer the assigned estate for the benefit of creditors under the supervision of that court.

The complaint filed August 21 stated a cause of action against defendant. Its filing was the commencement of the action.—Mills' Code, sec. 32.

“From the time of the filing of the complaint, or the service of a summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.”—Mills' Code, sec. 44.

An action therefore was pending August 21, when the order appointing a receiver was made. Further, through the filing of the amended complaint, August 22, and the issuance and service of summons therein, an action was pending upon that date. As stated, an amended petition for the appointment of a receiver was filed August 22, and remained undisposed of until August 29, when an order was made reinstating the order of August 21, and appointing appellee as receiver instead of the party designated in the original order. The district court acquired jurisdiction of the action, wherein a receiver was appointed August 21. The same court acquired jurisdiction of the assignment matter August 26. The action here is by the receiver against the assignee to have the assignment proceeding annulled, and to recover possession of all assets of The Arapahoe Paper Company, now in the possession of the defendant. It is a contest over the right to administer the assets of the insolvent defendant, The Arapahoe Paper Company, for the benefit of creditors.

From the statement of facts it appears that the

district court had acquired jurisdiction of the action in which the appointment of the receiver was sought, and of the parties before the court took jurisdiction of the assignment proceedings. This being true the authorities are that the assignment proceeding of later date pending in the same court must yield to the prior action in which the receiver was appointed.

In *Spinning & Brown v. Ohio Life Insurance & Trust Company et al.*, 2 Disney (Ohio) 336, October 14, a petition was filed by a creditor in the state court for the appointment of a receiver to take charge of the assets of insolvent defendant corporations. Same date summons issued and notice given that application for appointment of a receiver would be made October 18. October 16, certain creditors instituted proceedings in the U. S. circuit court for the same purpose. October 18, an order was made in the circuit court restraining defendant from any disposition of the property. A few minutes later an order appointing a receiver as prayed was made in the state court. A motion was presented in the state court to dismiss the proceedings there pending for want of jurisdiction upon the ground that another court—the above circuit court—had obtained prior jurisdiction of the subject-matter involved. The motion was denied, the court citing approvingly:

“When different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must, necessarily, have authority paramount to the other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties, in relation to the same subject, in the same or any other court. * * * and after one court of chancery has obtained rightful jurisdiction over a subject, another court of chancery, of only equal authority, should not exert jurisdiction over

the same matter; but whenever the fact is shown by competent evidence, should dismiss the bill."

In *Union Trust Co. v. Rockford, R. I. & St. L. R. R. Co.*, 6 Bissell 197, suit was brought in the United States circuit court for the appointment of a receiver. July 20 a general demurrer to the complaint was sustained and the court dismissed the action. July 22 a bill was filed by another plaintiff in the state court, and motion made for the appointment of a receiver. July 24, which was yet of the same term at which the demurrer was sustained, order dismissing the cause was set aside in the circuit court and leave given to amend and file a supplemental bill. July 25 a receiver was appointed in the suit pending in the state court. The federal court held that by the prior institution of suit in that court it had taken jurisdiction of the subject-matter, and although the state court had appointed a receiver between the institution of the suit in the federal court, and the hearing of the application for the appointment of a receiver, that such appointment in the state court would not oust the federal court of its jurisdiction of the subject-matter; that it would proceed to appoint a receiver, and that the receiver in the state court should turn over any assets in his possession to the receiver of the federal court. *Inter alia* the court said:

"It will hardly be necessary to cite authorities to show that it is, and has long been, the settled rule of law in all cases of conflict of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidently to take the possession of or control of the *res*, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction."—See also *Cohen v. Solomon*, 66 Fed. 411.

In *Belmont Nail Co. v. Columbia Iron & Steel Co. et al.*, 46 Fed. 3, March 26 the creditor filed a bill against defendant corporation for appointment of a receiver of its assets. Service gotten same date. April 2 notice was served on defendant advising it that an application would be made on April 4 for the appointment of a receiver. April 3 the defendant made an assignment of its assets. This previous assignment was urged in resistance of the appointment of the receiver. The court overruled the objection and appointed the receiver, holding that it had previously acquired jurisdiction of the subject-matter and the parties and that such jurisdiction was not ousted by the assignment. Therein it is said:

“Upon the service of the subpoena upon the defendant company the jurisdiction of this court was complete both as to the parties and the subject-matter. This, as the record shows, was on the 26th day of March, 1891. Hence the relation of the parties and the *status* of the property in question must be considered as of that date. No subsequent action of one of the parties could affect the rights of the other party. Any disposition by the defendant company of its assets (except the sale of personal property or transfer of negotiable securities to *bona fide* purchasers) would be invalid against the rights of the other party. * * * In the present case the defendant is admittedly insolvent, has undertaken in consequence of such insolvency to provide for liquidation and had anticipated the court in the appointment of a trustee for that purpose; but jurisdiction in this proceeding having vested before such appointment, the complainant has the right to say whether it acquiesces in such liquidation by the company's trustee. As it objects and insists upon its rights as they existed upon the service of the subpoena * * * I am of the opinion that the re-

ceiver should be appointed, regardless of the assignment by the officers of the company of its assets * * * .”

The judgment of the lower court annulling the assignment and ordering the assignee to deliver to the receiver assets of the insolvent company in his possession should be affirmed. *Affirmed.*

MAXWELL, J., not sitting.

[No. 2249.]

HOLSHOUSER v. THE DENVER GAS AND ELECTRIC
COMPANY.

1. Negligence—Invisible Danger—Duty of Employer to Warn
Employee.

Where an employer inducts an employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, it is the duty of the employer to impart to the employee his own knowledge of the situation, and his failure to do so would be negligence which would render the employer liable for an injury to the employee resulting from such invisible danger.

2. Same—Striking Employees.

Where an employer employed an employee knowing that such employee was in danger of being injured by striking employees and the employee had no knowledge of such danger, and the employer failed to warn him of the danger, the employer is liable for an injury to such employee by the striking employees.

Error to the District Court of Arapahoe County.

Mr. CLAY B. WHITFORD and Mr. HENRY E. MAY,
for plaintiff in error.

Messrs. THOMAS, BRYANT & LEE, for defendant in
error.

THOMSON, P. J.

The plaintiff in error was plaintiff, and the defendant in error defendant, below. A demurrer to the complaint for want of facts was sustained. The

plaintiff elected to abide by his pleading, and judgment was entered against him.

The complaint alleged that the defendant employed the plaintiff as a stoker in its gas works; that prior to his employment the defendant became involved in trouble with the men then working for it, the result of which was a strike by those men, all of them quitting work; that the strikers were very aggressive and threatened violence to any person or persons taking their positions; that the defendant, when it employed the plaintiff, was acquainted with the offensive attitude of the strikers and knew of their threats, but failed to disclose to the plaintiff the fact of the strike or give him any information concerning the disposition of the strikers or the threats they had made; that the plaintiff had not, at the time of his employment or at any time before he received the injuries complained of, any knowledge of the existence of the strike or of the angry temper of the defendant's old employees; that he commenced work for the defendant on the 21st day of June, 1899, and that on the 9th day of July following, while he was engaged in his work and unapprehensive of danger some of the strikers fired upon him, two of the shots taking effect, disabling him and causing him severe and painful injury.

The plaintiff, when he contracted to work for the defendant, took upon himself the usual and necessary risks of the employment; but concerning extrinsic or extraordinary dangers of which he had no knowledge he was entitled to information from the defendant before entering the service, if such information was in the defendant's possession. In *Perry v. Marsh*, 25 Ala. 659, it is said that if one employs a workman in a service which is apparently safe but which becomes hazardous from causes disconnected with the service which are not discoverable

by the exercise of ordinary prudence, he is bound by the strongest principles of morality and good faith to disclose the danger if known to him; and the failure to make such disclosure would be a breach of duty for which the employer would be held responsible if, while engaged in the work, the workman sustained an injury. This rule has been applied to a variety of facts and, so far as our research has extended, it is uniformly held that in inducting an employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be the employer, to escape responsibility, must impart to the employee his own knowledge of the situation.—*McGowan v. Mining & Smelting Co.*, 9 Fed. 861; *Smith v. Car Works*, 60 Mich. 501; *Fox v. White Lead and Color Works*, 84 Mich. 676; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Davies v. England*, 10 Jurist (N. S.) 1235; *Baxter v. Roberts*, 44 Calif. 187, 13 Am. Rep. 160; *Wood's Master and Servant* (2 ed.) 729-731; *Bailey's Master's Liability to Servant*, 122 *et seq.*; *Wharton on Negligence*, § 209.

In *McGowan v. Mining and Smelting Co.* it was decided that the master was liable for injuries to his servant caused by an explosion resulting from the overturning by the servant of a quantity of hot slag into water, even although the accident might have been attributable to the servant's own want of care, because the master had not advised him of the danger incident to the contact of the slag with the water. The court held that for a burn caused by the spilling of the slag on himself the servant could not have recovered because it would be assumed that he knew what the effect would be of a contact of hot slag with his person; but that a violent explosion would occur when the slag met the water he was not presumed to know, and this was a peril against which

he should have been warned. The facts in *Smith v. Car Works* were similar, and the ruling was the same. In *Fox v. White Lead and Color Works*, the defendant was engaged in the manufacture of paints, dry colors, Paris green and other poisons. The plaintiff, an employee, who had not been notified and did not know of the danger incident to the absorption into his system of the vapor arising from the boiling vats, suffered injury to his health in consequence of the mineral poison coming into contact with his skin. It was held that the defendant owed a duty to him not only to inform him of the effect of such contact, but to point out to him, if known, the precaution necessary to avoid it. Such also is the doctrine of *Davies v. England*. The same principle was applied in *Baxter v. Roberts*, which, in its principal facts, is almost exactly parallel with the case at bar. There the defendant employed the plaintiff to perform labor as a carpenter on premises claimed by him. In obedience to directions the plaintiff commenced to tear away some boards from a newly-erected fence, when he was fired upon from a neighboring lot and injured. The fence had been erected by the parties who did the firing and who claimed to be in its possession. The defendant knew that forcible resistance had been threatened to any interference with the fence, but he did not communicate his information to the plaintiff, and the latter was ignorant that in undertaking to perform the work he was incurring personal danger. The court held the defendant liable, saying:

“The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment and to conceal from him the fact of such danger is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third

persons acting in hostility to the interests of the employer and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if at the proffered compensation he be willing to assume the risk and incur the hazard of the business."

A difference is suggested between the latter case and the one before us in that the employer was there invading the premises of another and was therefore a trespasser, and the attack occurred immediately upon the attempted interference with the fence; whereas, here the defendant was conducting its business upon its own premises and there was no assault for eighteen days. We do not conceive this difference to be important. It strikes us that the degree of danger to be apprehended from exasperated men is not safely measurable by the cause of the exasperation. The destructiveness of firearms in the hands of persons determined to use them is the same, whatever the grievance or fancied grievance may be by which the murderous disposition is excited. The controlling feature of both cases is that the employer knowingly exposed the employee to personal danger, and concealed the danger from him. Neither are the

cases differentiated by the facts that in one the assault came immediately, and in the other was delayed for eighteen days. We have no right to assume from the fact of the delay that the peril did not exist during the intermediate time. Those committing the assault may have had no previous opportunity to act without danger of detection. That the threats were not meaningless is proved by the deadly onslaught which was made; and the supposition is entirely reasonable that the assailants would not have waited, but would have acted at once if they had thought they could do so with safety to themselves.

It is intimated that during the intervening time the plaintiff ought to have discovered that a strike was in existence, and that the defendant's old employees were in no tranquil frame of mind. How he might have made the discovery unless he had seen or heard something to suggest inquiry, we are not told. But it is the complaint and not the case which is on trial. It is alleged in that pleading that the plaintiff did not know that there was a strike, or that he was in any danger, until he was attacked. This explicit statement of fact is not to be met by mere argument. The facts necessary to charge the defendant with liability for the injury, namely, the existence of reasons to apprehend danger, the defendant's knowledge and the plaintiff's want of knowledge of their existence, and the defendant's failure to communicate to the plaintiff the knowledge in it possession, are all sufficiently averred. It was error to sustain the demurrer, and the judgment will be reversed.

Reversed.

MAXWELL, J., not sitting.

[No. 2227.]

**THE MOSCA MILLING AND ELEVATOR COMPANY ET AL. V.
MURTO, ADMINISTRATOR OF TURBUTT'S ESTATE.**

1. Deeds of Trust — Unauthorized Foreclosure — Negotiable Instrument.

Where the trustee in a deed of trust without a request or authority from the holder of the note secured thereby foreclosed the deed of trust, his deed conveyed no title and could not be used as an obstruction to a proceeding for foreclosure by the owner of the note whether or not the note was negotiable.

2. Same—Action to Set Aside Trustee's Deed—Fraud—Burden of Proof.

In an action by the holder of a note secured by a deed of trust to set aside a trustee's deed on the ground that the foreclosure by the trustee was without authority and fraudulent, and asking for foreclosure of the deed of trust, the burden of proof is upon the plaintiff to show the invalidity of the foreclosure sale.

3. Deeds of Trust—Foreclosure—Recitals in Trustee's Deed—Prima Facie Evidence.

Where a deed of trust provided that in case of foreclosure by the trustee the recitals in the trustee's deed should be prima facie evidence of the facts therein stated a trustee's deed thereunder reciting that application for foreclosure had been made by the legal holder of the note was prima facie evidence that such application had been made, and in an action by the holder of the note to set aside the trustee's deed on the ground that no application was made for the foreclosure it was error to refuse to allow defendant to introduce said trustee's deed in evidence until he had shown by other evidence the authority of the trustee to act.

4. Deeds of Trust—Foreclosure—Application of Purchase Money.

Where a deed of trust provided that in case of foreclosure the purchaser should not be required to see to the application of the purchase money, payment to the trustee by the purchaser at a foreclosure sale was sufficient and he was not required to prove that the money was paid to the holder of the note to establish the validity of the trustee's deed.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. MILTON SMITH, for appellants.

Mr. THOMAS H. HARDCASTLE, for appellee.

THOMSON, P. J.

Suit to foreclose a trust deed and set aside a conveyance made by the trustee.

The complaint alleged the making and delivery by Charles H. Fullenwider of his promissory note to The Colorado Securities Company for \$1,000, dated August 4, 1892, and payable on the 1st day of August, 1897, together with ten attached interest coupons for \$40 each, payable alternately on the 1st day of February and the 1st day of August until the maturity of the note; and for the purpose of securing the payment of the note and interest, the execution and delivery by him to The Colorado Securities Company of a trust deed conveying to Henry J. Aldrich as trustee certain real estate which it described. By this trust deed, which is set forth in the complaint, it was provided that in case of default in any of the payments either of principal or interest, when due, the whole of the principal sum and the accrued interest might at the option of the legal holder of the note at once become payable, and that on his application the premises conveyed by the trust deed might be sold by the trustee in the manner therein specified for the payment of the amount due, and a deed of conveyance of the premises sold, executed and delivered by the trustee to the purchaser. It was also stipulated in the trust deed that it should not be obligatory on the purchaser to see to the application of the purchase money and that the recitals in the deed executed by the trustee should be taken and accepted as *prima facie* evidence of the facts therein stated. The complaint further alleged that the last seven coupons were due and unpaid; that before the maturity of any of them or of the principal note the note and unpaid coupons were indorsed and assigned to the plaintiff, Samuel Turbutt, for value; that the trustee, Henry J. Aldrich, by his trustee's deed dated

the 15th day of October, 1894, and duly acknowledged and recorded, for the pretended consideration therein recited, fraudulently and without the knowledge or consent of the plaintiff conveyed the mortgaged premises to the defendant, John K. Mullen, and fraudulently and falsely recited in his trustee's deed that the premises had been sold on the application of the legal holder of the note, no such application having ever been made, and that the consideration named in the trustee's deed was never in fact paid by Mullen to Aldrich; that on the 18th day of February, 1895, the defendant, Mullen, by warranty deed, conveyed the premises to the defendant, The Mosca Milling and Elevator Company; and that both Mullen and the company received the title to the premises with knowledge of the plaintiff's claim, and with notice and knowledge that Henry J. Aldrich as trustee was without power in the premises.

The defendants answered, admitting the execution of the trust deed, note and coupons, to The Colorado Securities Company; the execution and delivery of the trustee's deed to Mullen; and the conveyance by Mullen to The Mosca Milling and Elevator Company, but denied that the sale was not made on the application of the legal holder of the note or that the recital in the trustee's deed that it was so made was false; denied knowledge by Mullen of the plaintiff's claim, and denied that the consideration named in the trustee's deed was not paid by Mullen to Aldrich. The answer also affirmatively averred default in the payment of the interest coupon due on the 1st day of August, 1894; the election of the legal holder of the indebtedness to declare the note and all accrued interest due and payable; his application to the trustee to sell the property; the proceedings of the trustee in conformity with the requirements of the trust deed; the purchase by Mullen, and the full pay-

ment by him of the consideration to Aldrich. The affirmative statements of the answer were denied by a replication.

On December 10, 1898, it appearing that the plaintiff was dead, Dennis Murto, who had been appointed his administrator, was substituted as plaintiff. At the trial the substituted plaintiff introduced the note and unpaid coupons, the trust deed and some evidence tending to show the assignment of the note and coupons to the original plaintiff, and then rested. The defendants introduced the deed from Mullen to The Mosca Milling and Elevator Company, and then offered the trustee's deed from Aldrich to Mullen which the court refused to admit. The court also denied their offer to prove that the full consideration named in the trustee's deed was paid by Mullen to the trustee. The court rendered judgment for the plaintiff according to the prayer of the complaint, and the defendants appealed.

Some question is made by the defendants upon the negotiability of the note. We are disposed to regard it as negotiable; but whether it was or not is immaterial. If upon the request of the holder of the note the property was regularly sold in the manner prescribed by the deed of trust and the consideration was duly paid, Mullen took a good title. If not he took none; and the instrument purporting to be a trustee's deed which he received from Aldrich could not be used as an obstruction to the proceeding of the owner of the note, whether it might be classed as a negotiable instrument or not, to enforce his remedy for its collection against the land.

But the theory of plaintiff's counsel is that after proof of the ownership of the note in the intestate and the exhibition of the note, coupons and trust deed, he established, *prima facie*, the case made by the complaint; and that it then devolved upon the

defendants to prove all the facts necessary to impart validity to the trustee's deed as a conveyance of title to Mullen. The action was brought not only for the foreclosure of the deed of trust, but as preliminary to the foreclosure for the setting aside and annulment of the trustee's deed. The complaint alleged the execution of the trustee's deed and described it as a conveyance; averred that it was fraudulently made, that its recital that the premises had been sold at foreclosure sale on the application of the legal holder of the note was false, and that the consideration it named was never paid. These allegations of fact upon which the plaintiff relied to invalidate the trustee's deed required some evidence in their support. Fraud is not presumed. In the complaint the trustee's deed was treated as an instrument valid on its face and an apparent conveyance of title, to be avoided by facts *aliunde*; and those facts, in the nonexistence of which the deed was valid, were expressly averred. Upon the theory of the complaint, until the trustee's deed should be set aside there could be no foreclosure by the plaintiff, and its avoidance, to the end that he might foreclose, being one of the principal objects of his suit, the case made by his proofs was not the case made by his pleading.

But let us concede the position of counsel that the evidence he introduced cast the burden upon the defendants to prove the deed from the trustee and all the facts necessary to constitute it a valid conveyance, and, upon such concession, see what justification may be found in the record for the decree as rendered. The defendants offered in evidence the deed from the trustee to Mullen, but on objection by the plaintiff it was rejected. The objection was not to the regularity of the proceedings leading up to the sale, as they appeared on the face of the instrument, but that the deed could not be received

until the defendants had shown the authority of the trustee to execute it. The only particular in which it was asserted that such authority was wanting was the lack of an application by the holder of the note to the trustee to make the sale. Among other recitals in the trustee's deed was one that application for the sale had been made by the holder of the note. This is charged to have been false. Except as to the payment of the consideration neither the truth nor the sufficiency of the other recitals is questioned. In the deed of trust it was stipulated by the parties that the recitals in the trustee's deed should be taken and accepted as *prima facie* evidence of the facts therein stated. It was competent for the parties so to contract, and the stipulation bound parties and privies. The assignee of the note took the security subject to all the covenants and agreements contained in the instrument. When, therefore, the defendants offered the trustee's deed in evidence they offered proof that the proper application had been made, because the trustee had so recited in his deed. The recital was not conclusive; but by the terms of the instrument authorizing the deed by the trustee and without the authority of which it could not legally have been executed at all, the recital was *prima facie* evidence of the controverted fact, and the burden was on the plaintiff to overcome the presumption so created.

But it is argued that the rule of *caveat emptor* applies to a trustee's sale and that the purchaser at such a sale is conclusively charged with notice of irregularities by the trustee in executing the power of sale. How counsel conceives this doctrine to affect the question we are considering he does not state. That "a trustee by written instrument is clothed with no powers save those which are expressed in the writing, and if his authority to act is in any

wise or at all dependent upon matters *in pais*, the parties dealing with the trustee are bound in the one case to see that the authority is expressly given by the instrument, and in the other that those facts exist which authorize the trustee to act," is well settled elsewhere, and is also the doctrine of our supreme court.—*Improvement Co. v. Whitehead*, 25 Colo. 354.

The rule thus announced would require proof by the defendants if the allegations of the complaint did not dispense with proof by them in the first instance of the facts necessary to empower the trustee to act; but it would not restrict them to any particular kind of competent evidence. By offering the trustee's deed which the parties themselves had made competent evidence of the facts it recited, they were endeavoring to make the requisite showing, and the refusal to receive the instrument was therefore erroneous.

As the remaining reason why the trustee's deed should be adjudged invalid, the complaint alleged "that the consideration therein named was never in fact or in truth paid by the said John K. Mullen to the said Henry J. Aldrich;" but when the defendants offered to prove that the full amount of the consideration named in the trustee's deed was paid to the trustee the plaintiff's counsel objected, and his objection was sustained. The ground of his objection was that proof of payment to the trustee was not enough; that it must be shown that the money was received by the holder of the note. But it was payment to the trustee, and not payment to the holder, which was in issue. No question was raised by the pleadings of payment to the holder; and proof of payment to the trustee was all that the issue required. But, upon another ground, no evidence that the holder received the money was necessary. The

trustee in making the sale, if the conditions existed empowering him to proceed, acted as the agent of the holder, and as such agent was authorized to receive the money for him; and the trust deed expressly provided that it should not be obligatory upon the purchaser to see to the application of the purchase money. Payment by Mullen to the trustee would, therefore, relieve him of further responsibility with reference to the purchase money. He was not bound to know that it was applied in payment of the note, and consequently was not required to prove that it was. It was error to sustain the objection.

Judgment must be reversed.

Reversed.

MAXWELL, J., not sitting.

[No. 2216.]

COULTER ET AL. V. THE BANK OF CLEAR CREEK COUNTY.

1. Bills and Notes—Venue.

Where a promissory note was made payable at a certain bank, the county in which such bank is situated was the proper county for trial of an action thereon, although defendants resided and were served with summons in another county and an application to change the place of trial to the county of defendants' residence was properly denied.

2. Bills and Notes—Endorsements—Evidence—Book Entries.

In an action upon a promissory note the book of original entries of a bank is admissible in evidence to corroborate endorsements of payments made upon the note.

3. Bills and Notes—Limitation—Payment—Joint Makers.

Payments made upon a promissory note by one of two joint makers will not stop the running of the statute of limitation as to the other maker.

Error to the County Court of Clear Creek County.

On Rehearing.

Mr. C. C. Post and Mr. I. N. SMITH, for plaintiffs in error.

Mr. J. J. WHITE, for defendant in error.

THOMSON, P. J.

Action on a promissory note made on the 8th day of November, 1889, by the plaintiffs in error to the defendant in error, and payable forty-five days after its date. The complaint which was filed on the 11th day of April, 1899, set forth the note, alleged that certain payments were endorsed upon it, the last endorsement being dated May 13, 1893, and averred the non-payment of the residue for which judgment was demanded. The answer denied payment of any sum upon the note by the defendants or either of them, and alleged that the cause of action did not accrue within six years before the commencement of the suit. The replication was a denial. Judgment was rendered for the plaintiff, and the defendants appealed.

This action was brought in the county court of Clear Creek county. The note by its terms was payable at the Bank of Clear Creek County. Before trial the defendants moved to change the place of trial from the county court of Clear Creek county to the county court of Routt county on the grounds that the defendants were both residents of Routt county, and that the summons in the action was served upon them in that county. The motion was supported by the affidavits of the defendants. The plaintiff met the defendants' affidavit by the affidavit of its assistant cashier, from which it appears that its place of business being the place where the note was payable was at Georgetown in Clear Creek county. The statements in this affidavit were not controverted. The motion was denied. Actions on contracts are triable in the county in which the defendants or any of them may reside at the commencement of the action, or in the county where the plaintiff resides, when service is had on the defendants in such county, or in the county where the contract is to be per-

formed.—Mills' Ann. Code, sec. 27. And where the action is not brought in the proper county, on application of the defendant the venue will be changed to the county where the cause is triable.—Mills' Ann. Code, sec. 29.

From the showing which was made it sufficiently appears that the county in which the action was brought was the county in which the contract was to be performed, and was therefore the proper county for trial. The motion was correctly denied.

For the purpose of verifying the endorsements on the note the defendant offered in evidence its book of original entries and also produced its assistant cashier, who testified that he wrote the endorsements on the back of the note and made the entries in the book. The entries, as to dates and amounts, corresponded with the endorsements. It is provided by our statute that no endorsement or memorandum of payment written on a promissory note shall be sufficient proof of payment to avoid the bar (Mills' Ann. Stats., sec. 2921), and the book was offered in support of the endorsements. Whether the book itself was sufficiently authenticated to render it admissible we need not inquire, because objection of insufficient authentication was not made. The objections, as made, were that it proved nothing, and that it was not admissible under the pleadings. We do not understand these objections. The book corroborated the endorsements and supported the allegations of the complaint respecting them. The objection was overruled, and correctly so.

Mr. Dewey testified that all the payments endorsed upon the note were made by the defendant, Coulter; that the defendant Richardson made none. The judgment was against both defendants. But the payments by Coulter operated to avoid the bar of the statute only as to himself. They did not affect

the standing of Richardson. As he had never made any payment the action as to him was barred, and it was error to render judgment against him.—Mills' Ann. Stats., sec. 2922.

As to Coulter, the judgment will be affirmed. As to Richardson it will be reversed, with instruction to enter judgment in his favor.

It is so ordered.

MAXWELL, J., not sitting.

[No. 2773.]

THE LOCKHAVEN TRUST AND SAFE DEPOSIT COMPANY
V. THE UNITED STATES MORTGAGE AND
TRUST COMPANY.

Mandamus—Bills of Exception.

Mandamus may issue to compel a judge to sign a bill of exceptions after it has been settled, but the duty of settling the bill, that is, determining what it shall embrace, is judicial, and where a judge refuses to sign a bill because it does not include matter which he thinks ought to be included mandamus will not issue to compel him to sign it.

Appeal from the District Court of Arapahoe County.

Mr. T. J. O'DONNELL, for appellant.

Messrs. DINES & WHITTED, Messrs. BROWN & GILLETTE and Messrs. BARTELS & BLOOD, for appellee.

THOMSON, P. J.

The appellant has made application to this court for an order upon the Honorable Frank P. Johnson, judge of the district court, by whom this cause was heard and adjudged, requiring him to sign and seal a bill of exceptions tendered by the petitioner.

The petition alleges the entry of the decree in the cause, the petitioner's prayer for an appeal to this court, the allowance of the appeal, the fixing of the time within which the petitioner should tender its

bill of exceptions and the tender of the bill within that time. The petition then alleges that, afterwards, the petitioner by its attorney appeared before the court for the purpose of having the bill of exceptions signed and sealed, but that the appellee interposed certain objections to the bill; that on the day the appeal was allowed, being some days after the rendition of the decree, the petitioner prayed the court to save an exception to the decree; that the bill of exceptions which was tendered set forth the prayer for the allowance of such exception, and that the judge declined to sign the bill of exceptions, not because the matter it contained was not true, but because he held, as a matter of law, that the bill should also show that at the time the exception to the decree was prayed the court refused to allow it to be entered.

The respondent judge has interposed an answer, setting forth a number of reasons why, in his opinion, the application should be denied; but we think a sufficient reason for its denial appears on the face of the petition, and we shall confine our discussion to that. The relief sought is mandatory, and the question before us must be determined by the rules of law which govern proceedings in mandamus. The order prayed, if allowed, would compel the signing and sealing by the judge who presided at the trial of the bill of exceptions as tendered by the petitioner. Mandamus lies to compel the performance of duties purely ministerial in their nature; but while it is an appropriate remedy to set the machinery of courts in motion, it will not control their action or direct the performance of any particular judicial act.—High's Ex. Rem., §§ 24, 152; *Union Colony v. Elliott*, 5 Colo. 371.

The act of signing and sealing a bill of exceptions after it has been settled is merely ministerial,

and may be compelled; but the duty of settling the bill—that is, of determining what it shall embrace—is judicial, and therefore, as to that, the judgment of the court or judge is not subject to control by mandamus.—Elliott's Appellate Procedure, § 798; *Hake v. Strubel*, 121 Ill. 321.

It appears from the petition that the bill of exceptions as tendered recited a prayer for the allowance of an exception to the decree interposed a considerable time after its rendition. The respondent held that having shown the prayer the bill should also show its denial by the court. The fact of the prayer for the allowance of the exception was not in dispute; but the judgment of the respondent seems to have been that a bill of exceptions reciting the prayer, which did not also show the ruling of the court upon it, was incomplete and was, therefore, not a proper bill. Whether this judgment was erroneous it is not necessary to inquire, but it was given in the exercise of a judicial power with which the respondent was clothed; and in this proceeding we are without authority to disturb it.—Elliott's Appellate Procedure, § 516; *Creager v. Meeker*, 22 Ohio State 207.

The petition will be denied.

Petition denied.

MAXWELL, J., not sitting.

[No. 2274.]

BURSON V. BOGART.

1. Agency—Evidence—Declarations of Agent.

Neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent.

2. Agency—Evidence.

Evidence examined and held not sufficient to establish agency so as to make defendant, the alleged principal, liable for goods purchased from plaintiff by the alleged agent.

3. Statute of Frauds—Promise to Pay Debt of Another—Landlord and Tenant.

Where plaintiff sold to a tenant goods and charged them upon his books to such tenant, a promise by the landlord to pay such account, made without consideration, was a promise to pay the debt of another within the statute of frauds, and was not binding unless made in writing.

4. Same—Instructions—Not Based on Evidence.

Where defendant verbally promised to pay to plaintiff the store account of his tenant after the goods had been sold and charged to the tenant, and there was no evidence of any consideration passing from plaintiff to defendant or that plaintiff released the tenant and accepted defendant as his debtor, an instruction to the effect that where there is a consideration for the promise to pay, it is unnecessary for it to be in writing and that to warrant a finding for plaintiff it must appear that he accepted defendant and released the tenant, was prejudicial error.

5. Practice—Evidence—Discretion of Court.

The form of questions and method of examination of witnesses are largely within the discretion of the trial court, and unless there is an arbitrary abuse of such discretion, the trial court's action in such matters will not be held to be reversible error.

Appeal from the District Court of Costilla County.

Mr. IRA J. BLOOMFIELD, for appellant.

Mr. JAMES W. SHIELDS, for appellee.

MAXWELL, J.

This case originated in the court of a justice of the peace of Costilla county, where judgment was rendered in favor of the plaintiff. Defendant took an appeal to the county court. By stipulation the case was transferred to the district court of Costilla county, where the case was tried to a jury which rendered a verdict against the defendant for the sum of \$156.40. Motion for a new trial was overruled and judgment entered upon the verdict. Defendant appeals.

There being no pleadings in the case the issues

must be determined from the facts as developed upon the trial. It appears that the suit was to recover upon an account for goods sold and delivered by the plaintiff, Bogart, to one Cobb, under the following circumstances. The account was opened June 22, 1898, in the name of R. M. Cobb and wife, and was so charged and entered upon plaintiff's books. Against the objection of defendant plaintiff testified as follows:

“Q. When Mr. Cobb came to you for goods what, if anything, did he say about Mr. Burson authorizing him to get goods?

“A. Mr. Burson told him to buy the goods, and that he would pay for them either at my place or any place.”

About the time the account was opened or, at any rate, July 1, 1898, Cobb became the tenant of Burson, appellant, under a written lease containing the usual covenants, upon an annual rental “of two-fifths of all crop grown.” Burson went east about September 7, 1898, and did not return until May, 1899, during all of which time Bogart was selling the goods to Cobb, for the recovery of the price of which this action was brought. Upon Burson's return in May, 1899, he was presented with the account, and a demand made for a settlement of the same. Several such demands were made and several interviews were had between Bogart and Burson with reference to the matter. At one of these interviews two women who testified at the trial were present, and while there are slight discrepancies in their testimony, neither Bogart nor these two witnesses testified that Burson ever admitted that Cobb was his agent for the purchase of the goods; and on the contrary Burson testified positively that Cobb was not his agent, and that he had never so admitted. The testimony of the two witnesses above referred to was to this effect: “Mr.

Bogart said to Mr. Cobb, 'Wasn't Mr. Burson to pay the bill?' and Mr. Cobb said 'Yes.' Mr. Burson was present at the time." Attempt was made to prove the ratification of Cobb's agency by Burson, but the testimony fell far short of accomplishing the purpose. Testimony was also introduced to the effect that Cobb took several wagon loads of wheat from Burson's granary, which he used as seed wheat upon Burson's land and for which he subsequently settled with Burson; that he bought seed oats which Burson paid for and charged to Cobb; that he drove several head of cattle, the property of Burson, from one pasture to another. This testimony was introduced, as it seems, for the purpose of establishing the fact that Cobb was acting as the general agent of Burson during his absence. Burson positively denied any such agency, and denied that Cobb was his agent for any purpose whatever except such agency as might arise by operation of law out of the relation of landlord and tenant. Bogart testified that he presented the account to Burson shortly after his return from the east and was allowed to testify, against the objection of defendant, that he, Burson, "did not seem to object to them." After Burson's return from the east \$100 was paid by Cobb on the account. This payment was made by means of a bank check drawn by Burson to the order of Cobb, endorsed by Cobb, delivered by him to Bogart and by Bogart applied as a credit upon the account. Cobb was not a witness at the trial as he had left the country at that time.

The above sets forth substantially all of the testimony introduced at the trial to establish the fact that Cobb was the agent of Burson in the matter in controversy. The agency of Cobb was relied upon by the plaintiff in the court below as one of the grounds upon which he could recover. It is assigned as error that the court permitted the plaintiff, Bogart, to tes-

tify against the objection of defendant as to the statement or declaration made by Cobb at the time the account was opened.

“It is well settled that neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent.”—*Lee S. M. Co. v. Englebach*, 18 Colo. 106.

This is a well-settled principle, in support of which many authorities might be cited. There was no evidence introduced at the trial to prove the agency of Cobb other than the question and answer above quoted, except the testimony of the two women as to a conversation between Bogart and Cobb, at which Burson was present, and certain acts of Cobb in the purchase of seed grain, driving the defendant's cattle from one pasture to another and other unimportant and immaterial matters, which evidence seemed to have been introduced upon the theory that such acts tended to prove a general agency, or that the defendant had held Cobb out to the public as his agent, and that thereby the plaintiff was led to believe that such agency existed. Such evidence, however, was not competent or sufficient to prove the agency relied upon, and formed no basis for the introduction of the declarations of the alleged agent above referred to, against the objection of defendant. In the absence of other competent testimony of the existence of the agency the declarations of the alleged agent are inadmissible. In the introduction of this testimony there was error prejudicial to the defendant. There is nothing in the record in support of the contention that Burson ratified the acts of Cobb; on the contrary, it abundantly appears that so far as this controversy is concerned, he explicitly and repeatedly repudiated such acts.

Another ground upon which the plaintiff sought to recover was the alleged promise of the defendant

to pay the account. This promise, if made, was a verbal promise, made after the defendant returned from the east. The plaintiff and two other witnesses in his behalf testified to the promise having been made by the defendant. The witnesses did not agree as to the date when this promise was made, plaintiff testifying that it was made shortly after Burson's return, Miss Bunn testifying that it was made in July or August. The other witness fixed no date. From all the evidence the fair inference is, that the conversation in which the promise is alleged to have been made took place at or about the time the account was closed—July 1, 1899. The defendant Burson emphatically denied that he ever made any such promise. Assuming that the promise was made, it was a collateral and not an original undertaking, as it is undisputed that the goods were charged upon the books of plaintiff to Cobb, or Cobb and wife, that Cobb had made several payments on the account, that there was no consideration moving from the promisee to the promisor in support of an original undertaking, nor is there any testimony whatever in the record to the effect that the plaintiff released Cobb and took the defendant as his debtor.—*Greene v. Latcham*, 2 Colo. App. 416.

In view of the foregoing it was error for the court to charge the jury, of its own motion, as follows:

“Provided, however, that where there is a consideration for the promise to pay that takes such case out of the statute of frauds and makes it unnecessary for such promise to pay to be in writing; but such consideration must really pass, and to charge one for the debt of another it must appear that the creditor accepted the promisor for the debt and released the original debtor. In this case, if you find against the plaintiff on the question of agency, then to warrant

you in finding for the plaintiff on the question of a promise to pay, it must appear not only that the promise was made, but that the plaintiff accepted defendant and released Cobb therefor."

This error was prejudicial to the defendant, and the instruction should not have been given, for the reason that there was no evidence in the record upon which such an instruction might have been based.

There are numerous other assignments of error as to the form of questions and method of examination of witnesses, and as to the refusal of the court to give instructions requested by defendant, none of which seem to be worthy of discussion. So far as the form of questions and method of examination of witnesses is concerned, it is sufficient to say that these matters are largely within the discretion of the trial court, and unless there should appear to be an arbitrary abuse of such discretion, the same will not be held to be reversible error.

For the reasons above assigned the judgment should be reversed and the cause remanded for further proceedings not inconsistent with the opinion herein expressed. *Reversed.*

[No. 2226.]

THE MERCANTILE NATIONAL BANK OF PUEBLO V.
PEABODY.

Bills and Notes—Collateral Security.

Where certain notes were placed in a bank for collection to secure first a liability of the cashier of the bank upon a bond of the holder of the notes, and second, to secure a note by the holder to plaintiff, and the bank agreed to collect said notes and so apply the proceeds, when the bank had collected sufficient money on said notes to satisfy the liability of the cashier and pay off plaintiff's note plaintiff could maintain an action against the bank for the amount of his note, and he was not required to wait till the bond upon which the cashier was liable was actually paid off before bringing his suit.

Appeal from the District Court of Pueblo County.

Mr. CHAS. E. GAST and Mr. J. H. MCCORKLE, for appellant.

Messrs. TELLER & DORSEY, for appellee.

GUNTER, J.

The facts herein are: J. R. Gordon was indebted to appellee in the sum of \$500. Appellee desired immediate payment; Gordon, further time. Appellee agreed to the time if Gordon would give a negotiable note for the debt. Gordon told appellee, substantially, that he had left with the American National Bank—to whose liability appellant has succeeded—certain notes for collection; that he would give his note and would see Mr. Gibson, cashier of the bank, and have it secured “with notes that were held in the bank.” After Gordon had talked with Gibson, appellee saw the latter at the bank and informed him what Gordon had stated. Gibson replied that what Gordon had said was true, and produced a large bundle of notes—those mentioned by Gordon—and directed appellee to examine them and determine if he wanted any of them for security. Appellee selected three notes, mentioned in the endorsement hereinafter set out. Gibson pronounced these notes good, and said: “He had some claim on Gordon, and he had to have enough to pay his claim, besides enough for the note. I (appellee) says, ‘Will these notes be enough?’ and he says ‘Plenty,’ and so he took these notes and put this endorsement on the note.” The endorsement referred to is as follows:

“This note has lodged as collateral security the following notes, which are held subject to the following conditions:

“Note, J. B. Orman, dated February 12, 1895, for \$1,250.00, payable 6 months after date;

“Notes, William Crook, dated March 8, 1895, for \$300 and \$275 each respectively, payable 3 months and 6 months after date.

“The conditions with which these notes are held as collateral as against this note are as follows:

“That when the bonds executed by Robert Gibson, on account the Mesa Hotel, are released and fully satisfied, and his liability discharged therefrom, then the funds arising from the collection of these notes are to be paid, first, to W. S. Peabody the amount of this note and interest, and an accounting made to J. R. Gordon for the balance.

“Robert Gibson, Cashier.”

The note upon which this endorsement was made was given by Gordon to appellee for \$500, due six months after date of the endorsement, to cover the indebtedness above mentioned from Gordon to appellee, and it was taken by appellee and an extension of the time given Gordon thereby in consideration of the foregoing endorsement upon the note.

The amount of the collateral notes was subsequently paid into the bank—whose cashier Gibson was—and went into what is designated as “Cashier’s Account,” which account is thus described by a witness of appellant, the former assistant cashier of the American National Bank, and such at the time of the transactions involved:

“Well, it is an account—say a person leaves a collection there and has no account with the bank, and probably had not had any transactions with the bank; it is simply credited to the cashier’s account, and when he came in there would be a check made and signed Cashier, and he would be paid his money.

* * * Yes, it would be a bank collection.”

It was agreed by the above endorsement that the proceeds of the collection of the collateral notes—so far as necessary—remaining after Gibson should be

discharged from liability by reason of having signed the Mesa Hotel bonds, should be paid to appellee in satisfaction of his note. Prior to the bringing of this action there had been paid to the bank the amount of the collateral notes, \$1,875, and it had been ascertained that the liability of Gibson on the bonds could not exceed \$994.93. There was thus in the hands of the bank in excess of the amount necessary to meet any possible liability of Gibson \$880.57, such excess being more than sufficient to discharge the note of appellee, principal and interest. As there could be no liability of Gibson upon which to apply this excess there was no reason for appellant bank retaining it. The condition upon which it was to be paid to appellee, to the extent of his note and interest, had been satisfied. Out of this excess appellee demanded payment of his note and interest, and being refused, brought this action to recover the amount of such demand upon the above agreement of endorsement. The trial was to court and jury. At the close of the evidence a verdict as directed by the court was returned for appellee for the amount claimed, and judgment entered accordingly. Therefrom is this appeal, and in support thereof appellant (defendant) contends that the contract of endorsement was the personal obligation of Gibson, and that there was sufficient evidence thereof to require the submission of the question to a jury. Further, that the action was prematurely brought, because Gibson had not been discharged from liability on the Mesa Hotel bonds at the time of the institution of the suit.

It is also insisted that error was committed in striking out a part of the answer.

Five witnesses testified. The facts herein above recited as those of the case appear largely from the testimony of appellee. Whether so or not, there is no conflict as to them. From the facts recited in the

opening of this opinion it appears that Gibson was the cashier of the bank, its real executive officer in the ordinary business of the bank; that the holding of these notes for collection and the promise to pay the proceeds thereof as directed by Gordon was in the line of such ordinary business; that in it, as he had apparent authority to do, he informed appellee that the bank held the notes belonging to Gordon for collection, and promised in the name of the bank, at Gordon's request—as he also had apparent authority to do—that from the collection of such notes on the condition named—the discharge of Gibson from liability on the Mesa Hotel bonds—to pay the note of \$500 given by Gordon to appellee. In consideration of this promise contained in the endorsement, appellee took the Gordon note. As the bank made this promise—as it collected the collateral notes and held the proceeds thereof—it should now pay the note of appellee unless it is necessary to retain the funds to meet a liability of Gibson on the Mesa Hotel bonds.

Upon the contention that all of the funds collected should be held to protect Gibson on such liability appellant insists that this action is prematurely brought. The bank agreed after Gibson was discharged from liability on the bonds, to pay over the proceeds of the collection of the collateral, or so much thereof as might be necessary, to appellee on his note. It has in its hands more than enough to pay all possible liability of Gibson and the note of appellee. There is no reason for its retaining more of the collection than enough to meet the liability of Gibson. There is no possible liability of Gibson upon which to apply such excess. The substance of the condition as to the discharge of the liability of Gibson has been satisfied, and was so prior to the institution of this suit. The action was not prematurely brought.

No error was committed in striking out a part

of appellant's answer, as all that was material in the matter stricken was preserved by the denials remaining.

The judgment should be affirmed.

Affirmed.

[No. 2261.]

TRUMBULL, RECEIVER, V. DONAHUE.

1. Negligence—Railroads—Crowded Condition of Car—Pleading—Evidence.

In an action against a railroad company for injuries to a passenger caused by the door of the car shutting and mashing plaintiff's finger while he was riding upon the platform an allegation that the car was crowded so that there was no room for plaintiff on the inside was proper as explanatory of why plaintiff was riding upon the platform and for the purpose of removing the presumption of contributory negligence, and evidence was admissible in support of such allegation. And an allegation and proof in support thereof of the crowded condition of the platform was proper as explanatory of why plaintiff was riding in the position he was with reference to the door.

2. Negligence—Railroads—Injury to Passenger—Evidence.

In an action against a railroad company for injuries to a passenger caused by a brakeman shutting the door of the car upon plaintiff's finger, the testimony of other passengers who were at the time riding with plaintiff upon the platform that they saw the position of plaintiff's hand at the time was admissible in corroboration of plaintiff's testimony as to his position on the platform.

3. Same—Admissions.

In an action against a railroad company for injuries caused by a brakeman shutting the door of the car upon plaintiff's finger, upon the issue as to whether or not the brakeman actually knew of the dangerous position of plaintiff's hand, statements and admissions of the brakeman made immediately after the mashing of plaintiff's finger were admissible as part of the *res gestae* to contradict the brakeman's testimony that he did not observe plaintiff's position at the time.

4. Negligence—Damages—Interest—Instructions.

In an action for damages for personal injury where the prayer of the complaint asked for interest upon the damages to be assessed, it was not prejudicial error to refuse a requested

instruction by defendant that no interest could be allowed where the instructions given upon the measure of damage confined the jury to an ascertainment of the actual damage sustained and left no room for an allowance of interest.

Appeal from the District Court of Clear Creek County.

MR. E. E. WHITTED and Mr. J. G. McMURRY, for appellant.

MR. J. J. WHITE, for appellee.

THOMSON, P. J.

Suit by the appellee against the appellant. The complaint alleged that the defendant was receiver of the Union Pacific, Denver & Gulf Railway Company; that on the 4th day of July, 1898, the plaintiff bought and paid for a ticket from Georgetown to Silver Plume, and entered one of the trains of the defendant to be carried as a passenger between those points; that the passenger car of the train was crowded with passengers, all the seats being occupied, and men, women and children standing in the aisle, so that he could not go through the car; that he then went upon the platform of the baggage car to which the passenger car was attached, the platforms of both cars being also occupied by passengers, and the only vacant place which he could find being on the platform of the baggage car; that the defendant's road between those points was rough, uneven and irregular, and had a great many curves; that the plaintiff stood in front of the door of the baggage car and braced and supported himself, and kept himself from falling off the car by placing his left hand on the frame of the door of the baggage car about six inches from the crack of the door and endeavored to keep it there, but the unsteady movement of the train would cause it to slip so that he could not possibly keep it constantly in one

place; that while he was standing on the platform and so supporting himself a brakeman in the employ of the defendant came from the passenger car, his intention being unknown to the plaintiff, and without giving any warning of what he was about to do, passed behind the plaintiff into the baggage car and then carelessly, negligently and recklessly shut the door, catching the little finger of the plaintiff's left hand between the door and the door frame, injuring, crippling and almost destroying it; that the brakeman saw, or ought to have seen, the dangerous position of the plaintiff, knew or ought to have known that the plaintiff's hand was liable to move on account of the unsteady movement of the train, knew or ought to have known that the plaintiff's position was necessitated by the overcrowded condition of the train, and knew of the curves in the road, and that the train was about to go round one of the curves. Judgment was demanded for \$1,500. The complaint also contained a prayer for interest on the amount from the day of the accident.

The defendant moved to strike out all those portions of the complaint relating to the condition of the train and platforms, the condition of the roadbed, the knowledge which the brakeman had or ought to have had of the condition of the road, and the knowledge he ought to have had of the position of the plaintiff. The motions were denied and the defendant answered, putting in issue the allegations of the complaint and averring that whatever injuries the plaintiff may have sustained were due to his own carelessness and negligence. The allegation of contributory negligence was denied by a replication. The plaintiff had a verdict for \$250, and from the judgment entered upon it the defendant appeals.

It appears from the evidence that, on the occasion in question, the train was furnished with a regu-

lar passenger car and a smoking car; that both cars were full of passengers; that the car platforms were also crowded; and that the roadbed was very rough and uneven. The plaintiff testified that, before boarding the train at Georgetown, he purchased a first-class ticket, and by reason of the crowd in the cars, went upon the platform at the rear end of the baggage car; that he rode with his left hand resting on the circular jamb to the right of the door of that car and his face toward the right side of the car; that without such support it was impossible, by reason of the roughness and unevenness of the road, to stand on the platform; that while he was standing there, and as the train was rounding a curve, a brakeman came upon the platform of the baggage car and opened the door; that just then the car, in passing around the curve, received a side jar which threw the plaintiff's hand into the door; that the brakeman then closed the door upon the plaintiff's finger; that to close it he pushed it twice; that while the plaintiff's finger was cut by the first push, it was not cut off; and that the brakeman then pushed the door the second time and cut off the finger. It appears that the plaintiff immediately put his shoulder to the door and forced it open, and he testified that the brakeman, who was on the inside of the door, holding it, then said to the conductor: "Look what this door has done to this man's hand." and to the plaintiff: "Turning that curve throwed your hands off; those doors are always hurting some one." The plaintiff also stated that in approaching the door to open it the brakeman passed behind him, and that he had no intimation or suspicion of what the brakeman was about to do. A number of persons who were riding on the platform saw the occurrence and also the position occupied by the plaintiff, and, as witnesses, corroborated his testimony as to his position, the

opening and shutting of the door and the resulting injury.

The denial by the court of the defendant's motion to strike out portions of the complaint; the admission of evidence in support of the allegations objected to; the permitting of witnesses to testify that they saw the position of the plaintiff before and at the time of the accident; the admission of the plaintiff's testimony that the brakeman said "Turning that curve throwed your hand off," and the refusal by the court of instructions requested by the defendant are assigned for error. There are other assignments, however, which are not mentioned in the argument, and will, therefore, not be noticed by us; but every point now pressed will receive careful consideration.

The objections to the allegation respecting the crowded condition of the train were that it was immaterial, and that the fact of such condition was not the proximate cause of the injury. The defendant not only sought to eliminate the allegation from the complaint but strenuously resisted the introduction of evidence in its support, on the additional ground that it would tend to create in the minds of the jury a feeling of resentment against the defendant, and a belief that he was careless of the welfare and comfort of his passengers. The allegation was matter of inducement. It explained the presence of the plaintiff on the platform. It was the duty of the defendant to provide accommodations for his passengers within his coaches. A passenger who unnecessarily undertakes to make his trip upon the platform of a car, voluntarily exposes himself to danger, and his negligence in so exposing himself might prove a serious obstruction in the way of a recovery for an injury sustained by him while in such position. If the plaintiff had alleged that he was riding on the

platform, without more, the omission would, *prima facie* at least, have been a confession of contributory negligence. We think an allegation explanatory of the reason why the plaintiff was riding on the platform and not in the car was proper, and if so, he had the right to prove it; and he would hardly be responsible for an unfavorable impression as against the defendant, which the evidence might produce in the minds of the jury.

The allegation, as well as the evidence, concerning the crowded condition of the platforms is on the same footing. It explained how it was that the plaintiff was compelled to occupy the particular place on the platform he did and incur liability to the very injury which he received.

The statement in the complaint that the brakeman ought to have seen the plaintiff's situation and known of the danger to which he was exposed is assailed on the ground that it was not part of the brakeman's duty to know what his situation was. In *Maddox v. Railway*, 38 L. T. 458, it was held that a servant of the company was not chargeable with negligence for failing to see that the plaintiff's thumb was in the hinge of the door after the latter had completely entered the carriage. In *Railway Co. v. Overall*, 82 Tex. 247, the facts were that the plaintiff was a passenger on the train of a railway company; that the train having stopped at a station and the door of the car in which he had been riding being opened and fastened, he took position on the platform with his hand resting upon the jamb upon which the door was swung, with his little finger inside the cleat which the door fitted when closed; and that while standing in that position a brakeman entered the car and suddenly closed the door upon plaintiff's finger. It was not shown that the brakeman saw the position of the plaintiff's finger. It was the opinion of the

court that the act of the plaintiff in placing his hand in such a position on the jamb of the door that it would certainly be injured by any one closing the door was an act of negligence; and that the brakeman was not guilty of negligence in failing to see the position of the plaintiff's finger, because he had the right to presume that the plaintiff was conducting himself with prudence. In *Murphy v. Railroad Co.*, 89 Ga. 832, a judgment of nonsuit against the plaintiff, whose fingers were crushed while he was standing within a crowded car, with his left hand braced on the door of the water closet as the result of a sudden opening and closing of the door by a workman who approached from behind, was sustained. The statement of the facts is accompanied by no formal opinion, so that we are ignorant of the grounds of the decision. It is in the syllabus that we are advised of the fact that the court so ruled; but whatever the question was which the case involved, the court was divided upon it. The foregoing authorities are cited by defendant's counsel in support of their position. Where there is nothing striking or unusual to arrest the attention of a trainman, he is not guilty of negligence in failing to observe just how each passenger has placed himself, and we do not understand those cases to go further; but we should dislike to commit ourselves to a doctrine that would leave a brakeman passing through a crowd of passengers riding upon the platform of a car because proper accommodations are not afforded them elsewhere and whose situation, particularly where the roadbed over which they are passing is rough and winding, is necessarily one of danger, equally free from responsibility. However, to pursue this discussion would be without practical result in this case, because the court submitted to the jury the question, not whether the situation of the

plaintiff ought to have been known to the brakeman, but whether he did in fact know it.

The brakeman, who was a witness, denied that he noticed the plaintiff's position, and it is contended that there was no competent evidence to overcome his positive testimony. Certain of the passengers on the platform testified that they saw the plaintiff standing and supporting himself in the manner described by him. Counsel reason that the admission of such testimony was improper because what they saw is no evidence of what the brakeman saw. The question, to what extent the fact that they noticed the plaintiff's position might warrant an inference that the brakeman also noticed it, is one we do not care to discuss. It is always proper for a party to support his own statement by the testimony of others. The plaintiff had testified as to his position on the platform, and these other witnesses simply corroborated him. There was no error in allowing them to do that. But upon the question of the brakeman's knowledge of the manner in which the plaintiff occupied the platform, there was other evidence, the propriety of the admission of which it is in order now to consider. This evidence was an expression of the brakeman immediately after the crushing of the plaintiff's finger. It is contended that the admission of this was erroneous because, first, the relation of the brakeman to the defendant was not such that what he said would bind the defendant; and, second, the expression was not part of the *res gestae*. The first objection may be dismissed without comment; but the second requires some examination. It is insisted that the declaration was independent of the principal fact; that at the time it was made the incident was closed—the transaction at an end. The testimony concerning the occurrences connected with the transaction was not harmonious; but the jury, by their ver-

dict, gave credit to that which was most favorable to the plaintiff, and in its light the question must be considered. Following it, we find the brakeman opening the door and then closing it on the plaintiff's finger; the plaintiff immediately forcing the door open; the brakeman holding the door on the inside and, on seeing the plaintiff's maimed hand, exclaiming first to the conductor and then to the plaintiff: "Look what this door has done to this man's hand." "Turning that curve throwed your hand off." Now it seems to us that these occurrences, commencing with the brakeman's opening of the door and closing with his last ejaculation, constituted one continuous transaction, and that the declarations were the natural and spontaneous outcome of the principal fact. In *Building Co. v. Klein*, 5 Colo. App. 348, it was suggested that if the elevator boy, after the child fell from the elevator, instead of abandoning her to her fate and continuing his upward course, as he did, had immediately lowered his elevator to the basement against the floor of which she struck, his first exclamation on coming in sight of her body would have been part of the transaction, and, therefore, competent as evidence. The suggestion there made fits the facts here. We think the inference legitimately deducible from the testimony was inconsistent with the brakeman's statement, as a witness, that he did not observe the plaintiff's position. If he had not seen the plaintiff standing on the platform steadying himself with his hand against the jamb of the door in such manner that the turn they were making on the curve was liable to throw his hand inside of the door just opened, how could he so readily and accurately have accounted for the accident? We think the declaration was properly admitted as part of the *res gestae*, and what effect should be given to it was for the jury to determine.—Wharton's Ev.,

§§ 258-261; *Union Casualty & Surety Co. v Mondy*, ante, 395, 71 Pac. 677.

The court denied a request by defendant's counsel to instruct the jury that no interest could be allowed upon any damages to which they might find the plaintiff to be entitled, neither as part of such damages nor as interest proper. This was the only ruling upon instructions refused or given which is challenged in argument. Unquestionably the proposed instruction was a correct statement of the law; but we are unable to discover any necessity for it. The instruction which was given relating to the measure of damages left no room for an allowance of interest. It confined the jury to an ascertainment of the amount of actual damage sustained, enumerating the elements to be considered and, consistently with its language, a finding of interest could not be made. But counsel seem to think that the jury might in some way have been influenced by the prayer for interest in the complaint. Even if they had known of the existence of the prayer it is not to be presumed that it would have caused them to depart from the instruction they received from the court; but it does not appear that they ever saw the complaint or had any information concerning its contents.

We find no error which would warrant us in reversing this judgment, and we therefore order it affirmed.

Affirmed.

[No. 2260.]

JOHNSON ET AL. v. BOTT.

1. Pleading—Misjoinder—Demurrer—Waiver.

A failure to demur to a complaint on the ground of misjoinder of parties waives the objection.

2. Pleading—Practice—Joint Judgment—Harmless Error.

Where a complaint stated a separate cause of action against each of two defendants and the cause was proven as to each

the fact that a joint judgment was rendered against the two was not prejudicial error.

Appeal from the District Court of El Paso County.

Mr. JOHN W. SHEAFOR and Mr. JOHN W. SLEEPER, for appellants.

Mr. H. M. BLACKMER and Messrs. McALLISTER & GANDY, for appellee.

GUNTER, J.

Appellant Johnson gave to one Carlton his promissory note and as security therefor a trust deed on certain real estate. Thereafter the note was assigned to appellee, the present holder.

After the execution of the note and prior to its maturity, Johnson conveyed the real estate covered by the trust deed to appellant Clow, who agreed with him for a valuable consideration to pay the note to the legal holder thereof. The note was not paid, and appellee, the legal holder, foreclosed the trust deed, realizing therefrom a part of the note. For the deficit in the note, after the foreclosure, appellee brought this action against appellants, Johnson and Clow, embodying in her complaint the above facts, and praying a joint judgment against appellants. Without questioning the complaint by demurrer or motion appellants answered. The case came to trial before court and jury. Before the introduction of evidence appellants jointly made this motion:

“The defendants move the court to dismiss this action for the reason that the complaint does not state facts sufficient to constitute a cause of action against the defendants or either of them, and in favor of plaintiff.”

The motion was denied, the allegations of the complaint proven, a verdict rendered in favor of appellee and against appellants under the direction of

the court, and a joint judgment entered against appellants thereon. The only ground urged in support of this appeal is that the court erred in overruling the above motion. They say that the motion in effect was a joint demurrer, that the complaint did not state facts sufficient to constitute a cause of action. They say it failed to state a cause of action in that it did not state facts showing a joint cause of action against appellants. It is not necessary for us to discuss whether or not appellee was entitled to a joint judgment against appellants upon the facts stated. As against appellant Johnson, the complaint stated that he made the note the balance due upon which was sued for; that such balance was unpaid, and that appellee was the legal holder thereof—that is, it stated a cause of action against Johnson. As to appellant Clow, it stated that for a valuable consideration he made an original promise to pay the legal holder of the note the amount thereof. It thus stated a cause of action as to him.—*Thatcher v. Rockwell*, 4 Colo. 409; *Fiske v. Reser*, 19 Colo. 88, 95.

That the complaint stated a cause of action, however, as to each of appellants, is not controverted. The question here is thus reduced to: Were appellants properly joined as parties defendant? If they were not (which we do not hold) the question was waived by a failure to demur on that ground.—*Mills' Ann. Code*, secs. 50, 55; *Colorado Coal and Iron Company v. Lamb*, 6 Colo. App. 255, 257.

Further, as the complaint stated according to the admission of appellants, a separate cause of action against each of them, and as such cause of action was proven, no prejudice was worked to either of them by the inclusion of the other in the judgment rendered. Appellant Clow was not injured by Johnson being included in the judgment, nor was Johnson by the inclusion of Clow. The error, if one, was

cured by section 78, Mills' Code, providing in substance that any error in the pleadings or proceedings which does not affect the substantial rights of the parties shall not be ground for reversal.

In *Decker v. Trilling*, 24 Wis. 610, two parties were joined as defendants, and a joint judgment went against them. It was the opinion of the court that separate judgments should have been taken against the defendants, and that the joint judgment was error. In the course of the opinion, however, it was said:

“But, however irregular the judgment may be in this respect, it will not for that reason be reversed. Sec. 40 * * * provides that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. This statute cures a multitude of errors, as the numerous cases in which it has been acted upon by this court will show. It is a beneficial statute designed to reach to just such a case as this. It is a matter of no consequence to a party separately liable to a judgment that some other person is included with him in the same judgment. It does not injure him in the least, but must be regarded as beneficial rather than otherwise, and the judgment must be affirmed.”

Judgment affirmed.

Affirmed.

[No. 2276.]

THE BULLION MILLING COMPANY v. THE GATES IRON
WORKS.

Corporations—Evidence.

In an action against a corporation for goods sold to another corporation the testimony of the seller that the corporation to whom the goods were sold was afterwards called by the name

of the corporation sued is insufficient to sustain a judgment against the corporation sued, where defendant's evidence showed that the two corporations were separate and distinct and that defendant was not a successor of the corporation to whom the goods were sold.

Error to the District Court of Arapahoe County.

Mr. D. V. BURNS, for plaintiff in error.

Mr. WM. L. DAYTON and Mr. H. A. LINDSLEY, for defendant in error.

THOMSON, P. J.

The Gates Iron Works brought this suit against The Bullion Milling Company to recover a balance which it claimed to be due it from the latter company. The complaint alleged the sale and delivery at different times by the plaintiff to the defendant of goods, wares, merchandise and machinery to the amount of \$2,200, and a payment by the defendant of \$1,000 on the account.

The answer denied the alleged sale and delivery to the defendant, and admitted the payment by it to the plaintiff of \$1,000, but averred that such payment was not made on account of any indebtedness alleged in the complaint.

In response to a notice by the defendant, the plaintiff furnished to it a bill of particulars of its claim, which showed a sale to a corporation called The San Miguel Mining and Development Company, of goods to the amount of \$2,070.19, and a sale to the defendant of goods amounting to \$116.65. The only evidence for the plaintiff was the deposition of Henry W. Hoyt, its secretary. The deposition contains the following interrogatory and answer:

“Did The Gates Iron Works, in the month of March, 1897, have any business transaction with The Bullion Milling Company? If so, state who transacted the business on behalf of The Gates Iron

Works, and state what business it was—state fully.”

Answer. “Yes. The business was transacted throughout by correspondence between the Denver sales office of Gates Iron Works, then in charge of Mr. B. L. Berkey, and the main office in Chicago under my direction. The business started in an order for a certain lot of mining machinery, which order was filled and shipped to The San Miguel Mining & Development Company, afterwards called the ‘Bullion Milling Company.’ ”

The latter portion of the above answer was the only evidence which undertook to identify the San Miguel company with the Bullion company. The defendant proved that The San Miguel Mining and Development Company and The Bullion Milling Company were distinct and independent organizations, the articles of incorporation of neither of which had ever been changed; that the Bullion company never succeeded to or had any of the business or property of the San Miguel company; that the latter corporation was never called The Bullion Milling Company; and that there had been a transaction between the plaintiff and defendant, but that it had no connection with the subject-matter of this suit. The court rendered judgment in the plaintiff’s favor for \$1,330.23.

We confess our inability to understand this judgment. Except as to a very small amount, the indebtedness which was proven was contracted by The San Miguel Mining & Development Company, and not by the defendant. The judgment has nothing to rest upon except an expression thrust by the witness Hoyt, into his answer to an interrogatory and which, presumably, he intended as a statement that after the goods were sold The San Miguel Mining & Development Company was called The Bullion Milling Company. But such a statement could amount to nothing

as evidence. The language is altogether insufficient to warrant the fastening of a liability upon the Bullion company for an indebtedness contracted by the San Miguel company. If the witness had heard one man call the latter corporation by the name of the former the expression would have been true. It nowhere appears to have had any stronger support; and without explanation of some kind it would authorize no inference that the two corporations were one. A corporation may change its name only in the manner provided by statute. No attempt was made to show any legal change of name, and the random expression of the witness counted for nothing.

But the defendant proved that the two corporations were separate entities; that the charters of each remained unchanged, and that there was no business or property connection between them; and it would require evidence of a very different character from the witness's statement to raise a question upon that proof.

Possibly the court might have been justified in giving the plaintiff a judgment for \$116.65, but anything more was unwarranted.

The judgment must be reversed.

Reversed.

[No. 2258.]

KELLOGG V. THE DENVER CITY TRAMWAY COMPANY.

1. Negligence—Master and Servant—Safe Appliances.

If a master has furnished his servant with proper machinery and appliances for the performance of the work required of the servant it is no part of the master's duty to see that the servant makes use of such machinery and appliances so furnished.

2. Same—Repairing.

Where a servant is employed to put a thing or place in a safe and suitable condition for use, it is not the master's duty to have such place or thing in safe condition and good repair for the purpose of such employment.

3. Same—Electric Railways—Linemen.

An electric railway company who employed a lineman whose duty it was to repair its poles and wires and to go upon the poles for the purpose of taking down and putting up wires did not owe to such employee the duty to inspect its poles and inform him whether or not any of them were so decayed as to be unsafe to work upon.

4. Same.

Plaintiff was employed by defendant, an electric railway company, as a lineman. Plaintiff had been engaged in the business of lineman and electric work several years and had been at work for defendant for three months. Plaintiff was supplied with proper appliances for bracing and strengthening poles which he might be required to climb. Held, that defendant was not liable for an injury to plaintiff caused by a pole which had rotted at the ground breaking and falling while plaintiff was upon it for the purpose of repairing the wires, and which plaintiff had neglected to brace or prop before going upon it.

Appeal from the District Court of Arapahoe County.

Mr. S. L. CARPENTER and Mr. JOHN T. BOTTOM,
for appellant.

Mr. A. M. STEVENSON and Mr. CHARLES J.
HUGHES, Jr., for appellee.

MAXWELL, J.

This was an action by the plaintiff to recover damages for the alleged negligence of the defendant's predecessor, The Denver Consolidated Tramway Company, which corporation by a consolidation with another corporation became the defendant herein. Trial to a jury. At the close of plaintiff's evidence defendant's motion to instruct the jury to return a verdict for the defendant was granted. Judgment was rendered in favor of defendant on the verdict, and plaintiff appeals.

Plaintiff was employed by defendant as a lineman, and was injured by the breaking and falling of a pole upon which he was working. Plaintiff testified that at the time of the accident he was twenty-

seven years old, had been working as a lineman for the company for about three months, and had been engaged in the business of lineman and electric work for about eight years. On the day when the accident occurred he was working with two other employees of the company, resetting poles, changing wires and placing back guys. That immediately preceding the accident he had ascended a pole and removed a wire therefrom; that this pole had been braced with two pike-poles, as Parker, who seemed to be in charge of the work, said it was rotten; that he was then ordered by Parker to splice the wire just removed from the pole and place it on the pole which subsequently broke. Plaintiff asked Parker if he intended to guy this pole, as there would be an added strain placed upon the pole. Parker replied that the pole had been tested the day before by digging down and testing it with a bar, and that it was perfectly sound. Plaintiff ascended the pole, which stood twenty-five or thirty feet above the ground, put the wire in position, put on a small block and tackle and commenced to pull up the slack, when the pole broke and carried plaintiff with it to the ground, seriously injuring him by the fall, and by bringing him in contact with live electric wires.

Plaintiff further testified that he was hired by Mr. Matthews; that Parker was the foreman, and worked with the linemen; that there were pike poles, grab hooks and other appliances for strengthening and bracing poles on the repair car at or near the place where the accident occurred. That the pole which broke was ten or twelve inches large at the top, and larger at the bottom; that it broke at the surface of the ground; that before he ascended the pole he made no examination whatever to determine whether the pole was safe or unsafe; that he did not know how old the pole was; that it appeared to be

like the other pole which was braced with pike poles; that in the performance of his duties he frequently had to climb poles, reset poles and wires, and remove decayed poles. Elliott, a witness for plaintiff, testified to substantially the same facts; that he made no examination of the pole; that dry rot at the surface of the ground caused it to break; that plaintiff did nothing to test the pole before climbing it except to place his hand upon it and push it. Two witnesses testified as to the nature, character and extent of the plaintiff's injuries. The foregoing is a fair summary of the evidence in the case.

In *Floyd v. Colo. Fuel and Iron Co.*, ante 153, 70 Pac. 452, this court has said:

“Now when, for the purpose of the work required of his employees, the master has provided upon the premises and within their reach suitable implements and appliances in suitable condition he has, in such regard, discharged his full duty toward them; and he is not responsible for their neglect to employ the instruments he has provided. Having those instruments at hand, they take their own chances upon the consequences of failing to use them”—citing a number of cases.

In other words, if the master has discharged his duty in furnishing the servant with proper machinery and appliances for the performance of the work required, it is no part of his duty to see to it that the servant makes use of such machinery and appliances so furnished. The evidence in this case shows that there were on the repair car, which was at or near the place where the accident occurred and within reach of plaintiff, grab hooks, pike poles and other appliances for bracing and securing poles. The evidence also shows that just before the accident occurred a pole which plaintiff had ascended had been secured by means of these appliances. So that it

seems clear that under the authorities above cited there was no such negligence or lack of reasonable care upon the part of the defendant in furnishing proper machinery and appliances for the performance of the work as would make defendant liable in this case.

Nor can it be said that under the facts in this case the master was required to provide the servant with a safe place in which to perform the work. For where a servant is employed to put a thing or place in a safe and suitable condition for use it would be obviously unreasonable and inconsistent to require the master to have such place or thing in a safe condition and good repair for the purpose of such employment.

The controlling question in this case is whether the defendant owed to the plaintiff, whose business it was to work upon poles along the line as occasion might require, the duty to inspect its poles and inform the plaintiff whether or not any of them were so decayed as to be unsafe to work upon. The plaintiff had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he must have known that it would be his duty to go upon poles that had been set in the ground for an uncertain length of time. He must have known that such poles would decay and become unsafe for him to work upon. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining the wires when they were all in proper position. It must be conceded that in this case negligence was not established by mere proof of an accident. The burden was upon plaintiff to show that the defendant's neglect of some duty caused the accident. We are of the opinion that the

risk of falling on account of the weakness of old poles was a risk of the business which the plaintiff assumed by his contract to work as a lineman for the defendant; that as between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed and unsafe, and there was therefore no evidence of negligence on the part of the defendant.—*McIsaac v. Northampton Electric Co.*, 172 Mass. 89.

For the reasons above stated the judgment of the court below should be affirmed.

Affirmed.

[No. 2257.]

ZIMMERMAN ET AL. V. THE DENVER CONSOLIDATED
TRAMWAY COMPANY.

1. Appellate Practice—Errors Not Discussed.

Errors assigned but not discussed by appellant or plaintiff in error either by brief or oral argument will be treated as abandoned.

2. Negligence—Street Railways—Appliance—Evidence.

In an action against a street railway company for running its car over and causing the death of a child, where there was nothing in the testimony tending to prove that the car was not properly equipped, nor that other appliances than those in use were better or safer, nor that any law or ordinance required the use of a fender at the time of the accident, it was not error to refuse to allow a witness to answer the question: "There was no fender like they have now?"

3. Negligence—Instructions—Evidence.

In an action against a street railway company for running its car over and killing a child, the court properly refused to submit to the jury the question of defendant's negligence in failing to provide the car with suitable contrivances for avoiding accidents of the kind, where there was no evidence upon which to predicate such instructions.

4. Negligence—Electric Railways—Safe Appliances.

The question as to whether or not a street railway company was negligent in failing to supply its car with proper appliances to avoid accidents must be determined by the character of appliances in use at the time of the accident in question without

regard to what was subsequently done in adding other appliances.

5. Negligence—Instructions—Measure of Damages—Harmless Error.

In an action for damages for personal injuries alleged to have been caused by defendant's negligence where the verdict of the jury is for the defendant, errors committed in instructions upon the question of the measure of damage are not prejudicial and will not justify a reversal.

Appeal from the District Court of Arapahoe County.

Mr. JOHN T. BOTTOM, for appellants.

Mr. A. M. STEVENSON, Mr. CHARLES J. HUGHES, Jr., and Mr. ALBERT SMITH, for appellee.

MAXWELL, J.

On May 7, 1898, the minor child of the appellants, aged five years, was killed on Twenty-second street between Champa and Curtis streets in the city of Denver by being run over by a motor car and trailer, at that time operated by the agents and employees of the appellee.

It is alleged in the complaint that the accident which caused the death of the child was without fault on the part of the minor, and "by reason of the culpable negligence of the defendant and that of its agents and employees." The answer denies all the allegations of the complaint except the incorporation of the appellee, and affirmatively alleges contributory negligence upon the part of the parents (appellants) in permitting the child to run at large upon the streets without a protector. A replication put in issue the question of contributory negligence. The cause was tried to a jury which returned a verdict for the defendant. Motion for new trial was overruled; judgment on the verdict in favor of the defendant. Plaintiffs appeal.

The testimony adduced at the trial shows that immediately preceding and at the time of the acci-

dent the child that was killed was playing with other children on Twenty-second street between Champa and Curtis streets; that the motor car was running down Twenty-second street towards the scene of the accident; that above the intersection of Twenty-second and Champa streets the car was brought to a halt, or "just simply moving." That about the center of Champa street the motorman saw the children playing on the sidewalk and in the street, together with the child that was killed; that the child that was killed "was running back and forth towards the track and back to the sidewalk;" that the child came to about seven feet from the car and about five feet from the track, when the gong was sounded vigorously and the motorman made an outcry to attract the attention of the child; that thereupon the child made a start to go toward the sidewalk, and then wheeled immediately in front of the dashboard, was knocked down, run over by the motor car, and the dead body was removed from under the front end of the trailer. That the motorman as soon as he saw the child wheel towards the track applied the brakes, reversed the car, put the current in the opposite direction, and did everything within his power to avoid the accident; that from the time the car crossed Champa street until it reached the point where the accident occurred it was running at the rate of five or six miles an hour.

There is some discrepancy in the testimony of the witnesses as to the rate of speed at which the car was running at and before the time the accident occurred. An examination of all the testimony leads to the conclusion that the car was not being run at a dangerous rate of speed.

Twenty-one errors are assigned, but as counsel does not think it necessary to discuss all of them in his brief or upon oral argument, we shall limit our

consideration of the errors assigned to those discussed by counsel, treating the others as having been abandoned.—*Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323; *Perkins v. Peterson*, 2 Colo. App. 242; *Schmidt v. First National Bank*, 10 Colo. App. 261.

“Was the verdict of the jury contrary to the evidence?” is the question asked by counsel for appellants in his printed brief, discussed by him with great ingenuity and ability through more than half of his brief, and very strenuously upon the oral argument, and finally passed up to this court for decision. This question is based upon the second assignment of error—“The verdict of the jury is contrary to the evidence.” This question was answered adversely to the appellants by the verdict of the jury, and the refusal of the trial court to grant a motion for a new trial; and on the authority of numerous decisions of this court and from a careful examination of the evidence, we do not feel justified in interfering with the verdict unless it shall appear from the record that serious legal error occurred upon the trial, either in the admission or rejection of evidence, or in the instructions given by the court to the jury as to the law of the case.

Error is assigned upon the refusal of the court to allow a witness to answer the following question:

“There was no fender like they have now?”

This witness was allowed to fully and particularly describe the construction and condition of the car, and especially the front end of the motor car. There was nothing in the testimony of this witness, or any other witness, tending to prove that the car was not properly equipped or that other appliances than those in use were better or safer, or that any law or ordinance required the use of a fender at the time of the accident; and we conclude that there was

no error in refusing to allow the witness to answer the question, for the reason that the question assumed that the "big fender like they have now" was an appliance which might or would have rendered the accident improbable or impossible, or was such an appliance as was required by law or ordinance at the time the accident occurred; or that the car was not properly equipped with efficient appliances for the prevention of accidents.

In *Hogan v. Citizens' Railway Co.*, 150 Mo. 36, 51 S. W. Rep. 473, it is held:

"No claim is made here that there was any law of the state or any ordinance of the city which made it the duty of the defendant to place fenders on its cars. The obligation to do so, therefore, must be found in the common law if there is any such obligation resting upon defendant. It is not claimed that the common law expressly imposed any such obligation, but it is claimed that 'defective appliances or no appliances at all or insufficient appliance is a question of negligence for the jury.' The obligation of the common law is that the defendant shall exercise ordinary care to prevent injury to the public. No particular kind of appliance is required to be used. It is only necessary that the defendant should have used such means to prevent injury to the public as a man of ordinary prudence would have used under the same circumstances. To predicate a charge of negligence upon a failure to use any particular kind of appliance is insufficient, especially in the absence of any averment that the appliances and means employed by defendant were not reasonably safe. * * * So with respect to its common-law duty to the public, it is not whether there are known appliances which the defendant did not use, but whether the appliances it does use are such as a person of ordinary prudence would have used, which determines the

question of its negligence. There was therefore no error in the ruling of the court sustaining the motion to strike out this allegation in the petition."

It is also contended that the court erred in refusing to give an instruction which after reciting some immaterial matters, contained the following language:

"If the jury believe from the evidence that the defendant has been negligent in not providing the car which ran over the son of the plaintiffs with suitable contrivances or contrivances for avoiding accidents of this kind * * * they will find the defendant guilty of negligence and liable to the plaintiffs in damages."

The refusal to give this instruction was proper, as the record fails to disclose any testimony whatever upon which the instruction asked could have been predicated.—*Ins. Co. v. Allis Co.*, 11 Colo. App. 264; *Fisk v. Electric Light Co.*, 3 Colo. App. 319.

And again, the liability of the defendant in this case must be determined by the character of the appliance or appliances in use at the time of the accident, without regard to what was done subsequently in adding other appliances, in compliance with an ordinance of the city, or for any other reason.—*Colorado Electric Co. v. Lubbers*, 11 Colo. 505; *D. & R. G. R. R. Co. v. Morton*, 3 Colo. App. 155.

Error is assigned upon the giving of an instruction containing the following language:

"The amount of your finding must be limited to the value of the services of the deceased son of plaintiffs from the time of his death until he would have attained the age of twenty-one years; less what it would be worth to feed, clothe, educate and care for him in a manner proper to his station in life," and also upon the giving and refusing of other instructions as to the measure of damages. As the jury

found for the defendant these errors, if errors they were, cannot have wrought any prejudice to the plaintiffs. The verdict is a finding of the issues in favor of the defendant. This means all the issues. In other words, there was no occasion for the jury to consider the measure of damages. We do not agree with counsel for appellants, who contends that under the above quoted instruction the jury could not have found any verdict for the plaintiffs. Generally speaking, it is immaterial whether an instruction which goes simply to the amount of the damages to be recovered is good or bad if the jury, upon proper instructions as to the question of negligence, the main issue, find against the plaintiff. The error complained of was not such an error as would have changed the result of the trial.

“The objections taken to the instructions of the court need not be considered. That portion of the charge to which they are taken concerns the measure of damages, and was for the guidance of the jury only in case they should find that the plaintiff was entitled to recover. The jury having found upon the main issue that the plaintiff * * * was not entitled to recover, that portion of the charge objected to had no use or office to fulfill.”—*Oppenheimer v. D. & R. G. R. R. Co.*, 9 Colo. 320.

Numerous authorities might be cited in support of the above proposition, but we do not deem it necessary. We express no opinion as to the correctness of the above quoted instruction as an abstract proposition or principle of law.

Other errors are assigned by counsel upon the giving or refusing of instructions as to the degree of care required of the defendant in the operation of its cars upon the streets of the city, but as they are not discussed by counsel we treat them as abandoned.

There is no such error in the record as to justify a reversal, and the judgment is therefore affirmed.

Affirmed.

[No. 2198.]

RUCKER V. THE OMAHA AND GRANT SMELTING AND
REFINING COMPANY.

18 487
378 425

1. Practice—Inconsistent Positions—Election of Counts.

Where plaintiff upon motion of defendant was required to elect which of two counts he would proceed upon, and defendant in making his motion and the court in acting thereon conceded that the count elected was upon contract, and throughout the trial the count was treated as upon contract, defendant will not be heard to say upon appeal, in order to secure an affirmance, that the count is in tort.

2. Attachment—Action Upon Undertaking—Election of Counts.

In an action upon an undertaking in attachment where plaintiff stated in one count a cause of action for the wrongful suing out of the writ and in another a cause of action for malicious prosecution in its issuance, it was error to require plaintiff to elect upon which of the two counts he would proceed.

3. Practice—Election of Counts—Waiver.

Where a plaintiff was erroneously required to elect as to which one of two counts he would proceed upon the error was not waived by going to trial upon the count so elected.

Appeal from the District Court of Arapahoe County.

MESSRS. WELLS & CHILES, Mr. M. F. TAYLOR and
Mr. JNO. G. TAYLOR, for appellant.

MESSRS. THOMAS, BRYANT & LEE and Mr. E.
HARVIE SMITH, for appellees.

GUNTER, J.

Appellant sued one of appellees, The Omaha and Grant Smelting and Refining Company, hereinafter designated as appellee, stating his cause of action in two counts. The first upon an undertaking in attachment for damages sustained in the wrongful suing out of the writ. The second for damages for malicious prosecution in its issuance. A general demurrer

to the complaint was overruled. Appellee then secured an order requiring appellant to elect upon which count to proceed. Thus compelled he chose the first, and thereon the case went to trial. There the court held that the evidence adduced failed to make a case against appellee on the cause of action pleaded. A judgment of nonsuit followed. Therefrom this appeal. Several reasons for reversal are urged. One, error of the court in requiring the election, is decisive. Appellee denies this was error and says if so, it was waived by plaintiff going to trial upon the remaining count.

On account of the condition of the record and possible future litigation we desire to be understood as confining this ruling to the one question stated, and in reaching our conclusion we assume that the first count of the complaint as originally constructed and as existing when the election was required was upon contract. That the second count was in tort has not been questioned. We make the assumption as to the first count without looking into its averments, because appellee in support of its motion to require the election conceded this count to be upon contract, and the court acted thereon in making the order. Throughout the trial below and in the original briefs, this count was treated as upon contract, and not until the oral argument of appellee was the point made that it was in tort. Appellee will not now be permitted in its effort to secure an affirmance to deny what it conceded in securing the order of election:

“The rule under discussion is no more than an application of the familiar doctrine of election which has its foundation in the old adage that ‘a man cannot blow both hot and cold,’ and hence there is nothing novel in it. The rule is one required by logic and practical considerations, since, without it, inconsis-

tent positions might be assumed without any other restriction than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, inasmuch as its principal purpose is to prevent deception, since, without it, parties might mislead their adversaries by assuming one position in the trial court and another on appeal. Nor could there be an orderly administration of justice without such a rule."—Elliott's Appellate Procedure, § 496. See also *Ib.*, §§ 489, 490 and 492.

Whether error was committed in making the order requiring an election between counts depends upon the application to the facts of section 49, Mills' Ann. Code, "The complaint shall contain * * * a statement of facts constituting the cause of action in ordinary and concise language without unnecessary repetition."

In *Cramer v. Oppenheimer*, 16 Colo. 504, 511, where three separate statements of the same cause of action were permitted, the court said:

"Duplicate statements for the same cause of action are not absolutely prohibited. They may sometimes be necessary and therefore permissible, as where there is a reasonable cause to believe that the plaintiff cannot safely go to trial upon a single statement. There may be circumstances under which the plaintiff cannot reasonably be expected to anticipate the evidence in advance of the trial."

In *Manders v. Craft*, 3 Colo. App. 236, plaintiff sued to recover for services rendered as a real estate agent, stating his cause of action in two counts. The trial court denied defendant's motion to require an election. In sustaining the ruling the court said:

"The obvious intention of the system of code pleading is that it shall be more equitable than that of the common law. To so construe as to render it more restrictive would defeat the intention."

In *Leonard v. Roberts*, 20 Colo. 88, 90, the cause of action was stated in two counts. The lower court refused an application for an order requiring an election. In the course of the opinion of affirmance it was said:

“It is sometimes impossible for the plaintiff to be certain in advance of the real ground of liability, and while double pleadings should be restricted within the narrowest limits possible without unnecessarily endangering plaintiff’s rights, subjecting him to the danger of a nonsuit, in this case the trial court properly refused the defendants’ motion to compel the plaintiff to elect upon which count he would proceed.”

In *Whitney et al. v. The Chicago and N. W. Ry. Co.*, 27 Wis. 327 (cited with approbation in *Manders v. Craft*, and *Leonard v. Roberts*, *supra*), it is said:

“It might be difficult to tell in advance what the evidence would show in regard to the liability of the defendant, and what facts would appear on the trial. * * * It is said that plaintiff ought to understand his own case and that the code requires that he should state the precise facts constituting his cause of action as he expects to prove it on the trial. This, as a general rule, is undoubtedly true; but it is not always possible in a transaction of this character to ascertain the real ground of liability. The present action furnishes a good illustration of the correctness of this remark. Before the proofs were in it would be impossible to tell whether the defendant could be held to the liability of a carrier or only to that of a warehouseman. And as no substantial reason was shown for compelling the plaintiffs to elect upon what ground they would attempt to charge the defendant, the court, we think, was guilty of no abuse of discretion in refusing to grant the motion.”

In *Wilson v. Smith*, 61 Calif. 209, 211 (approved

Leonard v. Roberts, supra) the cause of action was in two counts. The court declined to require an election. In affirming, the court, *inter alia*, said:

“Under our code, which provides that the complaint must contain ‘a statement of facts constituting the cause of action, in ordinary and concise language,’ the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only.”

At section 120, Bliss’ Code Pleading, the author says:

“Affirmative provision is made for the union of different causes of action, and it is not required that they may be such causes that a recovery may be had upon each; nor would the joinder be such a repetition of facts as is forbidden. The facts in the two statements would not be the same. There may be actually two grounds for the action or, being only one, certain supposed grounds may be connected that the plaintiff may not be able to tell in advance which will be established upon the trial. The code will have failed in its chief object if he is forbidden to develop every ground upon which he bases his right of recovery.”

—See also *Great Western Coal Co. v. Chicago G. W. Ry. Co.*, 98 Fed. (Cir. Ct. of Appeals, 8 Cir.) 274; *Rucker v. Hall*, 105 Calif. 425; *Crissey & Fowler Lumber Co. v. D. & R. G. R. Co.*, 17 Colo. App. 275, 68 Pac. 670-672.

Appellant, as a result of the attachment suit in which the undertaking was given and the writ issued, had a right to proceed against appellee upon the undertaking for damages sustained in the wrongful issuing out of the writ, and he also had the right to proceed against it for damages for malicious prosecution in the issuance of the writ. We do not say that he had the right to two judgments, or to more than one satisfaction for the wrong alleged; but only to

say that he had the two mentioned remedies. He did not know before trial how the court would rule upon the facts to be introduced in support of the first ground, or in the support of the second ground. This is evidenced in the progress of the case. The judge of one division before whom the case finally came held that certain evidence adduced did not make a case under the first count, and nonsuited for this reason, when a judge of another division had in effect held that the same evidence would make out a case under that count. It did not follow because appellant could not prove his case under the first count that he could not have established it under the second. To meet the evidence necessary to sustain the cause of action pleaded in the second count it was necessary to make certain averments which would have been impertinent to the allegations of the first count—for example, that the action was brought with malice and without probable cause. The second count was necessary to present a cause of action for malicious prosecution in suing out the writ. If this count had been in the complaint at the time of trial, and when the appellant was nonsuited upon the first count, he could then have had an opportunity to avail himself of his remedy through the second count, but as this had been stricken out by the court, his action was dismissed without his ever having had an opportunity to avail himself of the second count. The cause of action sued on accrued as long ago as 1890, and should the judgment of the court below be affirmed, even if appellee could not interpose the defense of *res adjudicata* in bar of an action now brought by appellant on the second count, appellant's remedy upon the cause of action stated therein would be barred by the statute of limitations. He would thus be deprived without fault on his part of ever having an opportunity to avail himself of the

remedy provided through the right to proceed upon the second count.

Appellant could not safely plead his cause of action in one count. He had a right to develop both counts upon which he based his right of recovery. The court denied him this right to his prejudice. The error so committed was not waived by going to trial on the remaining count. He did the only thing he could do.—*Great Western Coal Company v. Chicago G. W. Ry. Co.*, *supra*; *Rucker v. Hall*, *supra*.

Judgment reversed with leave to the parties to amend their pleadings as they may be advised.

Reversed.

[No. 2264.]

JOHNSON V. JOHNSON.

1. Partnership—Accounting—New Trial—New Evidence.

In an action by one partner against another for an accounting a new trial will not be granted on the ground of newly discovered evidence where the fact for which the new trial is asked is that the partner in whose favor judgment was rendered has since the trial sold certain of the partnership property.

2. Partnership—Accounting—Evidence—Harmless Error.

In an action for an accounting between two partners where a vast number of exhibits were introduced before the referee by both parties, the judgment of the court will not be reversed for refusing to strike out certain exhibits, even though they were incompetent, where the findings of the referee were warranted by other documentary and oral testimony introduced at the hearing.

3. Appellate Practice—Referees—Findings.

The findings of a referee upon conflicting evidence are entitled to the same consideration in the appellate court as the verdict of a jury or findings of the trial court.

Error to the District Court of Arapahoe County.

Mr. E. W. NORLIN, for plaintiff in error.

Mr. SAMUEL W. JOHNSON, for defendant in error.

MAXWELL, J.

The parties to this action were brothers who, for a number of years, were engaged in the dairy business as partners in the city of Denver. Theodore, the plaintiff in error, commenced a suit for an accounting against Olof, the defendant in error. By consent of the parties the matter was referred to a referee to "proceed according to law, and report his findings." The referee found that the plaintiff was indebted to the defendant in the sum of \$441.91 upon the accounting. Upon the report and findings of the referee the district court rendered judgment in favor of the defendant and against the plaintiff for said sum. A motion for a new trial was interposed, which was overruled, and judgment rendered as above. Plaintiff sues out this writ of error.

Numerous errors are assigned, but we will only consider those which have been presented in the printed brief, and upon the oral argument.

First. It is urged that the court erred in refusing to grant the motion for a new trial on the ground of newly discovered evidence. The motion *inter alia* states "that since the trial of said cause before the referee herein, the defendant has sold one horse belonging to the said copartnership, worth \$150.00." In support of the motion for a new trial the plaintiff filed his affidavit, which alleges, among other things, "that said horse was included in the accounting between these parties as the assets of the firm." Admitting the allegations of the affidavit to be true, it cannot be made the basis of a motion for a new trial as, from the very nature of the case, such testimony could not have been produced at the trial, as the fact complained of did not exist at that time.

Second. It is urged that the court erred in refusing to strike out exhibits Nos. 21 and 22, introduced at the trial by the defendant. These exhibits seem to be *copies* made by the defendant of certain

books, accounts, receipts and other papers relative to the partnership business, and may not have been competent evidence of the matters therein contained. It appears, however, that a vast number of exhibits were introduced by both the plaintiff and the defendant at the hearing before the referee, consisting of vouchers, receipts, accounts and other documentary evidence, tending to show the condition of the account between the parties. And while there may have been error committed by the court in refusing to strike out the exhibits above referred to, such error was not prejudicial to the plaintiff, as the findings of the referee were warranted by the other documentary evidence and oral testimony introduced at the hearing.

Third. It is strenuously urged by plaintiff in error that this court should sift and weigh the testimony in the case for the purpose of determining whether or not the findings of the referee are supported by the testimony introduced at the hearing.

“The cause was tried upon the testimony of witnesses examined orally before the referee, as well as upon books of account and other documentary evidence. The referee having heard and observed the witnesses and having authority to decide the whole issue, his findings of fact are entitled to the same consideration as the verdict of a jury or the findings of the court based upon oral and written evidence produced in open court.”—*Kimball v. Lyon*, 19 Colo. 266; *Noble v. Faull*, 26 Colo. 467.

From the foregoing it will appear that it is not incumbent upon this court to sift and weigh the evidence for the purpose of determining, if possible, whether or not different conclusions or findings might have been arrived at by the referee. However, suffice it to say that we have examined the record in this case with sufficient particularity to enable us to conclude that there is sufficient testimony

in support of the findings of the referee to warrant the same and to justify the judgment rendered by the district court.

For the reasons above assigned, the judgment will be affirmed. *Affirmed.*

[No. 2303.]

RUDOLPH V. SMITH.

1. Appellate Practice—Exception to Judgment—Evidence.

Where the trial was before the court, an assignment of error that the judgment is against the weight of evidence will not be considered unless an exception to the judgment is made part of the record by bill of exceptions. An entry following the findings of the court and judgment stating that an exception was taken constitutes no part of the record.

2. Appellate Practice—Bill of Exceptions—Motion for New Trial.

An assignment of error based on a refusal to grant a new trial will not be considered unless the motion for new trial is made part of the record by bill of exceptions.

3. Appellate Practice—Assignment of Errors—Evidence.

An assignment of error based on the improper admission or exclusion of evidence will not be considered where the assignment fails to point out any particular evidence improperly admitted or excluded.

Appeal from the District Court of Teller County.

Mr. JOHN W. HORNER, for appellant.

Messrs. HAWKINS, GRAHAM & CAMPBELL, of counsel.

Messrs. LUNT, BROOKS & WILLCOX, for appellee.

MAXWELL, J.

December 16, 1895, appellant and appellee entered into a copartnership for the purpose of carrying on a general second hand business at Cripple Creek. Dissentions having arisen, March 18, 1897, the partners had an accounting, a settlement of accounts and a dissolution of the copartnership. Oc-

18	496
19	294
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tober 19, 1899, appellant filed his complaint in the district court, wherein he alleged that since the accounting and settlement above mentioned an examination of the books of the copartnership (which had been wholly kept by and were under the control of the appellee) disclosed that "either through error, mistake or intentional fraud," the appellee had failed to credit appellant with stock in trade by him furnished to the copartnership, and had appropriated to himself large amounts of partnership funds without charging himself therefor upon the books of the copartnership, and prayed an accounting of all the affairs of the copartnership.

An answer and replication having been filed, the case came to trial before the court, a jury being waived, which trial resulted in a judgment for the defendant. A reversal of the judgment is urged for the following reasons:

1. The judgment is against the weight of evidence.

No exception to the judgment is preserved in the record. It is true that following the entry of the findings of the court and the order for judgment, it is stated that an exception was taken by plaintiff, but that entry constitutes no part of the record.

"Exceptions to the rulings and decisions of the court can be brought into the record only by bill of exceptions allowed, signed and sealed by the judge. Where a cause is heard by the court, an exception to the final judgment is necessary to authorize the appellate court to review the judgment upon the facts, or upon the law as applied to the facts; but the exception must be made a part of the record in the manner prescribed by law, otherwise it cannot be noticed."—*Burnell v. Wachtel*, 4 Colo. App. 556; *Breen v. Richardson*, 6 Colo. 605; *Rutter v. Shumway*,

16 Colo. 95; *Bank v. McCaskill*, 16 Colo. 408; *Cox v. Sargent*, 10 Colo. App. 1.

2. The court should have granted a new trial upon the ground of newly-discovered evidence, which was shown by an affidavit filed.

The affidavit upon which the motion for a new trial is based is not brought into the record by the bill of exceptions and for this reason the action of the court upon that motion cannot be reviewed here.—*Land and Town Co. v. Patton*, 21 Colo. 503; *Jordan v. The People*, 19 Colo. 417.

3. The court erred in the improper admission and rejection of evidence.

The assignments of error in this behalf cannot be considered as they are of the most general character and do not in any measure call our attention to any particular evidence improperly admitted or excluded.—*Old v. Keener*, 22 Colo. 6; *Fleming v. Daly*, 12 Colo. App. 439; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214; *Las Animas County v. Stone*, 11 Colo. App. 476.

The judgment of the court below is affirmed.

Affirmed.

[No. 2291.]

ABBY V. DEXTER.

1. Pleading—Contracts.

In an action upon a written contract the complaint may allege the contract according to its legal effect or by setting it out in haec verba.

2. Pleading—Contracts—Demand.

In an action upon a contract to pay money an allegation that defendant failed and refused to pay the money is a sufficient allegation of demand, especially in the absence of a demurrer, and where it is apparent from the answer that a demand would have been unavailing.

3. Continuance—Absent Witness.

An application for a continuance on account of an absent witness who resides in a different county from that of the trial

is insufficient unless it appears that an order of court has been obtained authorizing service of a subpoena outside of the county where the trial is had.

4. Same.

An application for a continuance on account of an absent witness is insufficient where the affidavit fails to allege that there are no other witnesses by whom the facts can be proven. A statement that "affiant knows of no other witnesses by whom said facts can be proven, whose testimony can be so readily procured" was not sufficient.

Appeal from the District Court of Teller County.

Messrs. HAWKINS, GRAHAM & CAMPBELL, for appellant.

Mr. W. O. TEMPLE and Mr. FRANK McLAUGHLIN, for appellee.

MAXWELL, J.

The insufficiency of the complaint to support the judgment, being one of the grounds upon which a reversal of the judgment is urged, it becomes necessary to set forth so much of the complaint as is pertinent to a discussion of this question. The complaint alleges that for a valuable consideration the following contract was entered into between the parties, to wit:

"This agreement, made between W. H. Dexter, party of the first part, and Jacob Abby, party of the second part, on the 21st day of August, A. D. 1894, witnesseth:

"That the said party of the first part has this day made a deed to the party of the second part for all his interest in the Lone Pine claim, situate in the Cripple Creek Mining District.

"Now, therefore, the party of the second part agrees that in consideration of the deed which the party of the first part has given to him for the Lone Pine claim, that he will pay to him five hundred (500) dollars out of the first proceeds of said claim which he shall receive from the sale of the claim or

from ore shipped; but if the party of the second part is unable to hold the Lone Pine or Success claims, then this agreement to be void.

“In witness whereof the parties have hereunto set their hands and seals.

“W. H. Dexter. [SEAL]

“Jacob Abby. [SEAL]

“We hereby guarantee the above contract.

“W. C. Clark.

“W. J. Chambers.”

“2. On information and belief, that hereafter, and on or about the 18th day of October, A. D. 1894, the defendant, Jacob Abby, sold and conveyed by deed to the Hermosa Gold Mining Company, a corporation, the said Lone Pine lode claim, or all his right, title and interest therein, and accepted from said corporation in payment for said claim or his said interest so conveyed, two hundred thousand (200,000) shares of the capital stock of the said corporation of the value of two thousand (\$2,000.00) dollars.

“3. That the defendant, Jacob Abby, has failed and refused to pay this plaintiff the sum of five hundred dollars (\$500) which he agreed to pay the plaintiff as aforesaid out of the first proceeds of the sale of said claim.” Following which is a demand for judgment.

It is contended by counsel for appellant that the contract pleaded must be treated as an “exhibit” attached to the complaint, and that upon the authority of *Brooks v. Paddock*, 6 Colo. 36, this portion of the complaint must be eliminated and disregarded. In this we cannot agree with counsel. In the above cited case “exhibit” is used to designate a paper or document attached to a pleading and made a part of it by reference only. The complaint in the case before us alleges that the parties entered into a written contract which is set forth *in haec verba*; the happen-

ing of the contingency upon which the money became due, and the refusal of the defendant to pay. It is well settled that in actions on contract it may either be set out in the language of the contract, or according to its legal effect. Appellant contends that the complaint is insufficient in that it does not allege a demand. The allegation that defendant failed and refused to pay the money, in an action upon a contract of this character, is a sufficient allegation of a demand, especially in the absence of a demurrer, and where it is apparent from the answer that a demand would have been unavailing.—*Gardner v. Donnelly*, 86 Calif. 367.

Error is assigned upon the refusal to grant defendant's motion for a continuance, which motion was upon the ground of the absence of a material witness. It was admitted upon the hearing of this motion "that no order of court had been obtained authorizing service of said subpoena on the witness Davie outside of Teller county." Under the decision of the supreme court in *Dawson v. Coston*, 18 Colo. 493, this admission was fatal to the application for a continuance. The affidavit was also insufficient in not showing that there were no other witnesses by whom the same facts could be proved, the affidavit stating "that he knows of no other witnesses by whom said facts can be proven, *whose testimony can be so readily procured.*" In any event, no prejudicial error was committed in refusing to grant the continuance, as the testimony of the absent witness was merely cumulative, and it is clearly evident that such testimony would not have changed the result.

The judgment is affirmed.

Affirmed.

[No. 2263.]

EHRICH V. DURKEE, SUBSTITUTED FOR DURKEE.**1. Contracts—Option to Pay in Land or Money—Time.**

Defendant by contract dated January 10, 1893, stipulated to pay plaintiff a certain amount by the conveyance of certain land within the year 1893 and in case of failure to convey the land within the time stipulated, defendant was to become immediately upon the expiration of one year from date of the contract personally indebted to plaintiff for the sum stated. Held, that the time within which defendant had a right to pay the debt by the conveyance of land expired on December 31, 1893, and not on January 10, 1894.

2. Contract—Option to Pay in Land—Demand for Conveyance—Description.

Where defendant contracted to pay plaintiff a certain sum with an option to pay by the conveyance of land within a certain time, the land to be selected by plaintiff, a demand by plaintiff, within the time, for a conveyance in which the land was described by definite boundaries on the south, east and west, and called for a line on the north parallel with the south line, and the width of the tract from north to south to be such as was necessary to make the amount of land he was entitled to under the contract, contained a sufficiently definite description of the land to form the basis of a deed.

3. Contracts—Option to Pay in Land—Absolute Liability.

Where defendant upon a valuable consideration contracted to pay a debt due to plaintiff by a conveyance to plaintiff of certain land within a certain time and in case of failure to convey to plaintiff the land within the time limited, defendant to become personally indebted to plaintiff, upon a failure by defendant to convey the land within the time he became absolutely liable to pay plaintiff the sum stipulated in money, and not merely such damages as plaintiff might have sustained, and the fact that the debt was originally the debt of another does not alter the relations of the parties to the contract.

Appeal from the County Court of El Paso County.

Messrs. LUNT, BROOKS & WILLCOX, for appellant.

Mr. CHARLES H. DUDLEY, for appellee.

MAXWELL, J.

January 10, 1893, Charles E. Durkee was a cred-

itor of The Ute Pass Land and Water Company to the amount of \$657.08. \$487.80 of this amount was to be paid in land, the balance in cash. Previous to above date Durkee had commenced a suit in attachment against the company for the purpose of enforcing payment of his claim. Appellant was president of The Ute Pass Land and Water Company. As the result of an interview between Durkee and Ehrich, the following contract was entered into by them:

“This agreement made and entered into this 10th day of January, A. D. 1893, by and between Louis R. Ehrich of El Paso County, Colorado, of the first part, and Charles E. Durkee of the same place of the second part,

“Witnesseth: That for and in consideration of the sum of one dollar (\$1.00) to the said first party in hand paid by said second party, the receipt whereof is hereby acknowledged, and also in further consideration that said second party will take such action only in his certain suit now pending in the district court of El Paso county, Colorado, against The Ute Pass Land and Water Company as said first party may direct, said first party hereby agrees to and with the said second party that he will convey or cause to be conveyed unto said second party within the year 1893, certain lots or parcels of land embraced within what is known as said Ute Pass Land and Water Company's townsite, excepting therefrom lots 38, 39, 40, 41, 59, 60 and 61 in El Paso county, Colorado, which embraces the lands heretofore levied upon by said second party in his said suit against said Ute Pass Land and Water Company as said second party may within said year at any time select; the said lands or parcels of land to be thus conveyed shall be sufficient in number, extent and area to be of the value of four hundred and eighty-seven dollars and eighty cents (\$487.80) at a valua-

tion of said lands and premises not exceeding one thousand dollars (\$1,000) per acre and at as much less a valuation thereupon as said first party or others in charge and control of the said land and premises shall hereafter and within three (3) months from the date hereof fix upon it as a scheduled valuation thereof; and further, that said first party will convey the said lots or parcels of lands to said second party or cause the same to be done as aforesaid by good and sufficient deed or deeds of warranty and fully free and clear of all encumbrances, liens and taxes whatsoever, so as to perfect in said second party a good and perfect title thereto in fee simple immediately upon such conveyance.

“And said first party further agrees to and with the said second party that in the event of his failure to make the said conveyance or conveyances as aforesaid or to cause the same to be done within the time above limited, then the said first party shall immediately upon the expiration of one year from the date hereof become personally indebted to said second party in the said sum of four hundred and eighty-seven dollars and eighty cents (\$487.80), which shall thereupon immediately become due and payable to said second party from said first party without grace or any further extension whatever in any event. Executed in duplicate.

“In witness whereof the parties have hereunto set their hands this 10th day of January, A. D. 1893.

[SIGNED] “Louis R. Ehrich.

[SIGNED] “C. E. Durkee.”

Under date of December 28, 1893, Durkee made the following demand in writing upon the appellant:

“Colorado Springs, Colo., Dec. 28, 1893.

“Louis R. Ehrich, Esq.,

“Colorado Springs, Colo.

“Dear Sir: In pursuance of our agreement of

January 10, A. D. 1893, I am entitled to about 487-1000 of an acre under the agreement, and I select the same off the southerly portion of lot 19 in Ute Pass Land and Water Company's townsite, the same to be bounded on the southerly side by lot 20; on the westerly side by lot 18; on the easterly side by Carnia road or street, and the same to be such width from north to south as is necessary to make the amount of land I am entitled to, and to be bounded on the northerly side by a line parallel to dividing line between lots 19 and 20; and I ask of you a warranty deed of said premises conveying a clear title, as per our agreement of January 10, A. D. 1893.

“C. E. Durkee.”

The complaint set forth the contract and demand, alleged performance on part of plaintiff, the failure of defendant to convey or cause to be conveyed the land, and prayed judgment for \$487.80 and interest. The answer admitted the execution and delivery of the contract; denied selection of the land by a sufficient description; alleged that the contract was without consideration; that the land was the property of The Ute Pass Land and Water Company; that defendant was acting solely as agent of said company; that the company and defendant were always able, ready and willing to convey the land, and that time was not of the essence of the contract. A replication put in issue the affirmative defenses of the answer. Trial was had before the court, a jury being waived. A number of witnesses testified, and documentary evidence was introduced—which trial resulted in a judgment for the plaintiff for \$720.00, being the amount sued for, with interest. Defendant appeals.

The grounds upon which appellant urges a reversal of the judgment may be summarized under four heads.

1. That the time limit within which he might have made the conveyance or caused the same to be made under the contract was January 10, 1894, and that within such time limit he tendered performance.

2. That the description contained in the demand hereinbefore set forth was too indefinite to form the basis of a deed.

3. That time was not of the essence of the contract.

4. That the money to be paid by the terms of the contract was in the nature of a penal obligation, the contract being collateral, and that plaintiff could only recover actual damages.

The language of the contract—"Said first party hereby agrees to and with the said second party that he will convey or cause to be conveyed unto said second party within the year 1893 certain lots," etc.—negatives the contention of appellant that he had until January 10, 1894, to make or cause to be made the conveyance. The above language is definite, certain, clear and unambiguous, and interprets itself. Nothing in the contract modifies, changes or renders the above language uncertain. The subsequent language, "one year from the date hereof," fixes the time when the appellant shall "become personally indebted" in the sum of \$487.80. To place any other construction or interpretation upon the written contract would be to make a contract for the parties different from that which they had made for themselves. The parties reduced their contract to writing, and it must be allowed to speak for itself.

The contention that the description of the land contained in the demand dated December 28, 1893, is not sufficiently definite to enable appellant to make a deed is not supported by the law or the evidence.

"If a surveyor by applying the rules of surveying can locate the land, the description is sufficient.

And generally the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed."—Devlin on Deeds, § 1012; *Pennington v. Flock*, 93 Ind. 378; *Smiley v. Fries*, 104 Ill. 416.

Mr. Reid, the surveyor of The Ute Pass Land and Water Company, testified that the description contained in the demand gave a definite and certain piece of ground off the south side of lot 19. The contract refers to "certain lots or parcels of land embraced within what is known as said Ute Pass Land and Water Company's townsite," and excepts from its operation certain lots *by number*, clearly indicating that the plats introduced in evidence were in existence at the time the contract was drawn, and such plats were in contemplation of the parties at the time the contract was executed. If the appellee was satisfied with the description contained in the demand, the appellant should have been.

This is not a case where one, the owner of land, agrees to make conveyance of the same to another, and upon failure so to do, pay a sum certain as liquidated damages or as a penalty, and therefore this case is clearly distinguishable from the authorities cited by counsel for appellant, in which the principles governing liquidated damages, penalties and forfeitures are discussed. In other words this is not an action to enforce specific performance of a contract for the conveyance of land, but it is an action to enforce payment of a debt under the terms of a written contract payable in one of two methods, the time for making payment by one method having expired, and therefore the above principles do not apply.

For the same reasons, the question whether or not time was of the essence of the contract, is im-

material. This is an original agreement based upon a sufficient consideration, to pay a valid subsisting indebtedness (secured by lien) in one of two ways: First, by the conveyance of land within a limited time, or, second, after the expiration of the time limit—by a payment in money. The fact that the debt was originally the debt of another does not alter the relations of the parties to the contract, or in any wise relieve the appellant of the obligations assumed by him. The primary and ultimate object of the contract was the payment of the debt due appellee. By the terms of the contract appellant was given his election as to the manner in which the debt should be paid—in land within a specified time, after that, in money. He was given an opportunity to pay in land, which he declined; therefore the money became due. He has made his election, and must abide the consequences. If appellant had desired to relieve himself of the money payment, he might have tendered, so far as he could under the contract, the land payment at any time on or before December 31, 1893. Having failed to do this, and having failed to make the conveyance upon demand within the time limited, he became liable on the money demand, and that liability having attached, can be satisfied by a payment of money only, under the undisputed facts of this case.

In cases of this character much must be left to the judgment and sound discretion of the judge who hears the case, and where his determination is reasonably supported by the evidence and is consistent with the principles of law applicable, it should not be disturbed by the appellate court. From a careful examination of the record in this case and a thorough examination of the authorities cited we are convinced that the judgment is amply supported by

the evidence, and is not inconsistent with the principles of law applicable.

The judgment is affirmed.

Affirmed.

[No. 2172.]

TELLER V. HILL.

18	509
358	359

1. Statute of Uses—Conveyances—Trusts.

The statute of uses (27 Henry VIII, chap. 10) is in force in Colorado, and where land is conveyed to one person for the use of or in trust for others, by a deed which expresses a mere passive trust, the legal as well as the equitable title vests thereby in the cestuis que trust and the trustee takes nothing.

2. Same—Judgment Liens.

Where land was deeded to one person for the use of others by a deed which merely expressed a passive trust and such deed was recorded, a title in fee was thereby vested in the cestuis que trust, and a transcript of judgment against the cestuis que trust being filed, the judgment lien thus created, in favor of the judgment creditors was superior to any secret lien or trust existing in favor of the trustee created by oral agreement between the trustee and the cestuis que trust of which the judgment creditors had no notice.

3. Same—Attorneys' Liens.

Where land was conveyed to a trustee for the use of other parties by a deed which expressed a mere passive trust which deed was recorded, a judgment lien created by filing a transcript of judgment against the cestuis que trust was superior to an attorney's lien in favor of the trustee of which the judgment creditors had no notice.

4. Attorneys' Liens—Waiver—Contracts.

An agreement between an attorney and his clients whereby the attorney at a sale of land, under a decree obtained by him for his clients was to purchase the property in trust for his clients and sell the same and out of the proceeds pay his fee and costs was a waiver of his attorney's lien.

Appeal from the District Court of Arapahoe County.

Messrs. TELLER & DORSEY, for appellant.

Mr. H. M. TELLER and Mr. JAMES H. TELLER, of counsel.

Mr. W. C. KINGSLEY and Mr. RICHARD McKNIGHT, for appellee.

GUNTER, J.

September, 1887, Ellen R. Seymour and W. G. Pell, owners of certain mining property, conveyed the same to the Slide and Spur Gold Mines Company (Limited). In 1889, the company having defaulted in the payment of the purchase price of the property so conveyed, the vendors, Seymour and Pell, sued in the United States circuit court for the district of Colorado to have decreed a vendor's lien upon the property sold, and in July, 1890, obtained a decree establishing their lien. September, 1894, the master in chancery sold the property under the decree, and in May following made a deed, pertinent parts of which are as follows:

“Now, therefore, I, Adolphus Capron, one of the masters in chancery of the said court, did on the said 24th day of September, A. D. 1894, at one o'clock p. m. of the said day, at the front door of the court house of the county of Boulder, in the city of Boulder, it being the time and place at which the said sale was announced in the said advertisement to take place, offer for sale to the highest bidder for cash the same premises above described, except that in and by the terms of said decree the complainants were allowed at the said sale to bid for said property up to the amount of said decree with interest thereon without paying any cash except sufficient to pay costs, and thereupon Willard Teller bid for the said complainants, in his name for the use of complainants, the sum of \$362,000, and he, at that price, being the highest bidder therefor, the same was struck off and sold to the said Willard Teller, and

“Whereas, it was further in said decree ordered and decreed that upon said sale the said master in

chancery making such sale should make, execute and deliver to the purchaser a deed of the property so sold by him, upon the execution and delivery of which the said defendant, the Slide and Spur Gold Mines Company (Ltd.), its successors and assigns, and all persons claiming through, by or under it, should be forever barred of all right, title or interest in said property, and of all equity of redemption thereof.

“Now therefore I, Adolphus Capron, master in chancery aforesaid, do by these presents grant, bargain, sell and convey unto the said Willard Teller, trustee, and to his heirs and assigns forever the said real estate * * * to have and to hold to the said Willard Teller, trustee, for his heirs and assigns forever.”

This deed was of date May 11, 1895, and recorded in the office of the county clerk of the county wherein the property was situate May 13, same year. April, 1894, a judgment for \$3,571.00 and costs was recovered by appellee Hill against Ellen R. Seymour and W. G. Pell *et al.*, and a transcript thereof was filed in the office of the clerk of the said county of Boulder.

In April, 1895, the present action was instituted by appellee for the purpose of subjecting the above mining property conveyed by the deed from the master in chancery to Teller, trustee, to the judgment of appellee, and to have his judgment declared a prior lien to any claim of the appellant Teller.

From the judgment awarding appellee the relief prayed the defendant below has appealed.

The position of appellee is that the Statute of Uses, 27 Henry VIII, c. 10, operated upon the legal estate conveyed to Teller by the master's deed executing the legal estate and uniting thereby the legal and equitable estate in the *cestuis que use*, who

thus became complete owners of the estate as well at law as in equity; that upon the estate of the *cestuis que use* Seymour and Pell thus created the transcript of the appellee's judgment by operation of law became a lien, and that such lien was superior to any secret lien existing between appellant Teller, and Seymour and Pell, the beneficiaries under the master's deed.

Appellant denies that the Statute of Uses is in force in Colorado. Contends that if it is, it did not operate upon the master's deed, because the trust created thereby and by a certain oral agreement was an active trust, and therefore not within the statute. Further, that the firm of Teller & Orahood had an attorney's lien upon the estate created by the master, superior to the lien created by the transcript of judgment of appellee.

1. We have adopted, along with the common law of England, "all acts and statutes of the British parliament made in aid of or to supply the defects of the common law prior to the fourth year of James the First" as are of a general nature, except designated statutes.—Mills' Ann. Stats., vol. 2, § 4184.

That the Statute of Uses was one of the statutes so adopted by this commonwealth, was ruled in *Morgan v. Rogers* (Cir. Ct. App., 8 Cir.), 79 Fed. 577. No authority is cited to the contrary.

2. The master's deed recites that "complainants Pell and Seymour were allowed to bid without paying any cash except sufficient for costs, and that thereupon Willard Teller *bought for complainants* in his own name for the *use of said complainants* * * * . Therefore I, Adolphus Capron * * * grant, bargain, sell and convey unto the said Willard Teller, trustee, * * * , to have and to hold unto the said Willard Teller, trustee, * * * ."

According to the language of this deed Willard Teller purchased the property conveyed for the use of complainants, and it was deeded to him, according to the language of this deed, for the use of complainants, that is, Seymour and Pell.

“Recitals are introduced for the purpose of explaining why the deed is executed, or of showing circumstances which preserve the connection in the chain of title, * * *. Particular recitals are conclusive evidence of the facts recited in actions in which the purpose of the deed is directly involved.”—Devlin on Deeds, § 992.

“The rule is well settled that the parties to a deed are bound by the recitals in it legitimately appertaining to the subject-matter, and that this applies to privies in blood, privies in estate and privies in law.”—*Robbins v. McMillan*, 26 Mass. (4 Cush.) 434.

There is thus on record a deed wherein the grantor conveys to the grantee certain real estate for the use of third parties. The parties thus created, if we look to the recorded deed alone, an express passive trust. A conveyance of such character is within the Statute of Uses.

“Thus, if A. grants or bequeaths land to B. and his heirs, in trust for C. and his heirs, the trustee B. will take nothing in the land, but the legal title, as well as the beneficial use, will vest immediately in C., for the Statute of Uses, so called, executes the possession and the legal title in the same person to whom the beneficial interest is given. * * * A use, a trust and a confidence is one and the same thing, and if an estate is conveyed to one person for the use of or upon a trust for another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. So absolute

is the statute that it will operate upon all conveyances in the words above stated, although it was the plain intention of the settler that the estate should vest and remain in the first donee; for the intention of the citizen cannot control express enactments of the legislature, or positive rules of property.” —Perry on Trusts (5 ed.), § 298.

“Every estate in lands which shall be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to be granted, devised or conveyed by operation of law.” —Mills’ Ann. Stats., vol. 1, p. 587, sec. 433.

Reading this section of the statute into the master’s deed, the substance of the language of the deed becomes a grant of land by A. to B. and his heirs in trust for C. and D. and their heirs:

“The Statute of Uses will only operate upon a conveyance to uses, and transfer the legal to the holder of the equitable title, when the following three elements are present: First, a person seized to a use, and *in esse*; second, a *cestui que* use *in esse*; and, third, a use *in esse*.” —Tiedman on Real Property, § 460.

Appellant contends, as stated, that all the terms of the use or trust were not embodied in the deed, and it appeared undisputed from the evidence which he tendered, and which the court declined to consider, that in 1889 Seymour and Pell employed the firm of Teller & Orahod to bring an action against the Slide Spur Gold Mines Company (Ltd.) to establish for them a vendors’ lien for the unpaid portion of the purchase money. That Teller and Orahod brought such action under the agreement of Seymour and Pell to pay them reasonable compensa-

tion for their services, and that they obtained the decree establishing the vendors' lien, and that prior to the sale of the property Seymour and Pell agreed that Mr. Willard Teller should buy in the property at the master's sale, taking the title to himself as trustee under the further agreement that he should operate and develop the property, and so soon as he was able to obtain a reasonable price therefor sell it, pay to the firm of Teller & Orahod the attorneys' fees due them, and all expenses of litigation, and expenses incurred in the operation and preservation of the property. This agreement was oral, and in pursuance of it Mr. Willard Teller bought in the property, proceeded to operate it, and incurred unsatisfied expense in so doing, and also paid large sums for taxes due upon the property. The court declined to receive this evidence.

Appellee had no notice actual or constructive of this oral agreement between Teller and Seymour and Pell.

Appellant contends that his oral agreement with Seymour and Pell that he should have a lien upon this property for the purpose named could be shown against the lien of record of appellee, and although appellee had no notice of it, should be superior to the lien of appellee.

“All deeds, conveyances, agreements in writing of or affecting title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent *bona fide* purchasers and incumbrancers by mortgage, judg-

ment or otherwise not having notice thereof.”
—Mills’ Ann. Stats., vol. 1, sec. 446.

This statute has frequently been construed by our courts. In *Perkins v. Adams*, 16 Colo. App. 96, Perkins and Maurice were executors of the will of Touzalin, deceased. As authorized by the will, the executors loaned \$30,000.00 of the money of the estate to Bailey, who secured the loan by a trust deed upon certain real estate in East Denver, one Van Kleeck being trustee. The note not being paid at maturity, the trustee, upon request of the executors, sold the property pursuant to the terms of the deed. At the sale the property was purchased by Perkins, and it was conveyed to him by the trustee. The deed to him was dated September 4, 1895, and was recorded on the 6th day of September, same year. January, 1897, Adams and Holmes sued Perkins to recover a certain indebtedness, and in aid of the action sued out a writ of attachment, which writ was levied upon the property conveyed to Perkins. March, 1897, Perkins conveyed the property to Maurice and himself as executors of the will of Touzalin. August, 1897, the executors commenced this action against Adams and Holmes to remove from their title the cloud created by the levy of the attachment, alleging, among other matters, that Perkins never paid any part of the purchase price of the property from his own money, but took and held the title as trustee for the estate of the decedent. The defendants, Adams and Holmes, relied upon their attachment lien and want of notice or knowledge that Perkins was not the absolute owner of the property, or that he held the title otherwise than in his individual capacity. The court sustained the contention of the defendants and said:

“There can be no doubt that as between Perkins and estate, the property belonged to the latter;

but we must look further to find what the rights of the estate as against these defendants may be."

Then quotes the section of our statute last cited. After the quotation the opinion proceeds:

"By virtue of that provision, a purchaser or incumbrancer of land may rely upon the title which he finds upon the record, and will be protected against an outstanding claim which the record does not show, and of which he has no actual notice. And it has been held by the supreme court and this court that the lien of an attachment is an incumbrance within the meaning of the statute, and takes precedence of an unrecorded title or interest of which the attaching creditor had no notice at the time of his attachment. * * * These defendants found the title to the property in question standing upon the record in the name of Mr. Perkins, and in their suits against him levied their attachment upon it. * * * By an arrangement between himself and his coexecutors he took the title for the benefit of the estate, proposing to sell the property and turn the proceeds over to the estate. As between himself and the estate, he was a trustee, and equity would compel him to account to the estate for the property; but third persons would not be affected by the trust, unless they had actual notice of its existence, or unless there was something which they were bound to know suggestive of its existence. * * * The deed recites that Perkins was the highest and best bidder, and that the property was sold to him. It acknowledges the receipt of the purchase money from him and conveys the land to him, his heirs and assigns, forever. This is the record which the estate, by its executors, caused to be made upon the title; and as to outside parties with no knowledge of the situation except what may be gained from it it imparts absolute verity. The plaintiffs were

entitled to rely upon that record, and were not called upon to look further.”

In *Jerome v. Carbonate National Bank*, 22 Colo. 37, the contest was between one claiming under the lien of an attachment levied, and one claiming under a prior but unrecorded deed. The court held the lien of attachment superior to the rights conveyed by the unrecorded deed, assigning as its reason therefor the section of statute just cited, and in the course of the opinion the court said:

“Whatever the law may be in other jurisdictions, it is settled in this state that one who takes property in payment or security of a pre-existing debt is to be regarded as a purchaser for a valuable consideration. * * * An attaching creditor belongs to that class of lienors described in the statute as incumbrancers otherwise than by mortgage or judgment.”

In *McFarran v. Knox*, 5 Colo. 217, McFarran had a judgment against McGovney, and filed the transcript thereof in the office of the recorder of the county where certain real estate in which McGovney had an interest was situate. By an unrecorded instrument of which McFarran had no knowledge McGovney had transferred his interest in the lot by a prior assignment to one Knox. It was held that the transcript of judgment was a prior lien over the interest acquired by the secret agreement between McGovney and Knox. The court said, in speaking of the unrecorded bond through which Knox claimed:

“A bond for the conveyance of real estate comes clearly within the provisions of this section, and unless recorded will not take effect as against a subsequent *bona fide* purchaser or incumbrancer without notice.”

Our statute, Mills', vol. 3, sec. 2529, provides:

“All and singular * * * the real estate of every person against whom any judgment shall be obtained in any court of record either at law or in equity, for any debt, damages, costs or any other sum of money, shall be liable to be sold on execution, to be issued upon such attachment, and a transcript of the docket entry of any judgment in the judgment docket, certified by the clerk, may be filed with the recorder of any county; and from the time of filing such transcript the judgment shall become a lien upon all the real property of such judgment debtor, and not exempt from execution in such county, owned by him, or which he may *afterwards acquire*, until the said lien expires.”

In *Emery v. Yount*, 7 Colo. 110, the court said:

“If he (the judgment creditor) takes advantage of the statute and records, he obtains a judgment lien upon all the realty of the debtor not exempt from execution, * * * this lien takes precedence over subsequent purchases or incumbrances thereof.”

In *McMurtrie v. Riddell*, 9 Colo. 501, the court said:

“No subsequent transfer or incumbrance by the debtor can prejudice the right of such creditor.”

Applying the law to the facts before us, the deed of the master in chancery construed from its unambiguous language, conveyed the real estate in question to Teller, trustee, for the use of Seymour and Pell. The estate so conveyed was unlimited as to time. The legal title so conveyed was in fee—so was the use. The Statute of Uses operated, transferred the legal title to *cestuis que use* who, perforce the statute and the deed became the owner in fee of the legal and equitable estate in the property conveyed. In legal effect the deed of the master conveyed the entire legal and equitable estate in

the property to Seymour and Pell. When such an estate was declared by the recording of the deed, the transcript of judgment of appellee immediately attached to it, creating a lien superior to the secret lien, which, by oral agreement, existed between appellant and Seymour and Pell.

3. Appellant further contends that he has a superior lien to appellee through his attorney's lien.

Appellee had no notice of appellant's right to or intention to claim an attorney's lien at the time he filed his transcript of judgment, and, therefore, the lien acquired through his transcript is superior to the right of an attorney's lien if one still exist between appellant and Seymour and Pell.—*Johnson v. McMillen*, 13 Colo. 426; *Fillmore v. Wells*, 10 Colo. 234; *B. & C. S. Co. v. Pless*, 9 Colo. 112.

Further, if the court below had received the evidence offered it would have shown that by the contract which appellant relied upon to show an active trust the right to an attorney's lien was waived.—*Whitehead v. Jessup*, 7 Colo. App. 461.

We think the judgment below was right, and should be affirmed. *Affirmed.*

[No. 2284.]

THE TABOR MINES AND MILLS COMPANY v. NEWELL.

Contracts—Judgments—Accord and Satisfaction.

Defendants having a judgment against plaintiff with a decree of foreclosure on plaintiff's mine, entered into a contract with plaintiff whereby defendants agreed to accept within a certain time a certain sum with interest in satisfaction of the judgment, and plaintiff's lessee was to pay to defendants a certain part of the royalties due plaintiff under the lease as such royalties fell due, to be applied on the sum agreed to be paid in satisfaction of the judgment, and in any event the amounts so paid to be credited on the judgment and not to be recoverable back by plaintiff and the parties agreed to stay further legal proceedings for the time mentioned, the defendant to forbear the enforcement

of his foreclosure decree, and plaintiff agreed to sue out no writ of error during the time, and the sum agreed on not having been paid within the time, another contract was executed extending the time for payment with a stipulation if not paid within the time as extended defendants were to be relegated to their rights under the decree. Held, that the contracts were not an accord and satisfaction of the judgment and decree and that the amount agreed on not having been paid within the time, defendants could proceed to foreclose for the amount of the judgment less the payments made under the contracts.

Error to the District Court of Lake County.

MR. A. S. BLAKE, MR. H. B. JOHNSON, MR. L. J. STARK and MR. J. WARNER MILLS, for plaintiff in error.

MR. JOHN M. MAXWELL, for defendants in error.

GUNTER, J.

August 11, 1896, plaintiff in error entered into a contract with defendants in error, pertinent parts of which are the following, to wit:

“Whereas, on the 11th day of June, A. D. 1896, there was rendered in the district court of the county of Lake, state of Colorado, a judgment and decree of foreclosure in a suit then and there pending in favor of the parties of the second part against the party of the first part, and

“Whereas, all the parties hereto are desirous of compromising and settling the said judgment;

“Now, therefore, in consideration of the premises, it is mutually agreed and understood by and between the parties hereto that the parties of the second part will accept the sum of eighteen thousand (\$18,000) dollars with interest on said sum from the 3d day of July, A. D. 1896, at one per cent. (1 per cent.) per month, to be paid as hereinafter specified, in full consideration and satisfaction of settlement of said judgment and decree.

“That the party of the first part, The Tabor Mines and Mills Company, will pay or cause to be paid all taxable costs which have accrued in the suit of *James W. Newell et al. v. The Tabor Mines and Mills Company et al.*, in the district court of Lake County, state of Colorado, which costs shall be deducted by the parties of the second part from the first royalties to be by them received from The Ransom Leasing Company.

“That The Ransom Leasing Company which is at the present time the lessee of the Matchless Mine, situated in Lake county, state of Colorado, under and by virtue of a lease from The Tabor Mines and Mills Company dated the 10th day of July, A. D. 1895, shall pay to the parties of the second part or their heirs seven-eighths ($\frac{7}{8}$) of all royalties which have accrued and shall accrue under and by virtue of said mining lease from and after the 3d day of July, A. D. 1896, for the period of eighteen (18) months from the date of this contract * * *. That for the purpose of computing interest under and by virtue of the terms of this contract it is hereby agreed and understood that interest on the sum remaining due on the first day of each month from and after the date of this contract at the rate of one per cent (1 per cent.) per month shall be computed and that such interest shall be first deducted from the amount of royalty at that time paid and unapplied, and that the balance of such royalty shall be applied upon the principal sum then remaining due.

“That upon the execution of this contract the order of the district court of the county of Lake, state of Colorado, entered in the case of *James W. Newell et al. v. The Tabor Mines and Mills Company et al.*, on the 24th day of June, A. D. 1896, requiring the defendant, The Ransom Leasing Company, to

deposit the royalties under such lease in the American National Bank of Leadville, Colorado, shall be set aside and for naught held, and that all further legal proceedings between the parties hereto shall be stayed for the period of eighteen (18) months from the date of this contract, and that during the period of said eighteen (18) months that parties of the second part shall not sell or cause to be sold under said decree of foreclosure the property mentioned and described in said decree.

“It is mutually agreed and understood by and between the parties hereto that this contract is made and entered into without prejudice to the rights of the defendant, The Tabor Mines and Mills Company, to prosecute its writ of error in the court of appeals or the supreme court of the state of Colorado at the expiration of the eighteen (18) months from the date hereof; provided said defendant should see fit so to do, and nothing herein contained shall prevent the said The Tabor Mines and Mills Company from completing its bill of exceptions and having the same signed, sealed and filed. * * *

“And it is further agreed and understood that what is here done and proposed to be done is simply by way of a compromise of the matter now in suit; provided, however, that it is distinctly agreed and understood by and between the parties hereto that any and all sums of money which shall be received by the parties of the second part on account of royalties to them paid by The Ransom Leasing Company shall be considered as payment upon said judgment and decree, and shall not in any event be recoverable of or from the parties of the second part in any suit or action to be hereafter commenced against them by the said The Tabor Mines and Mills Company.

“It is further agreed and understood that The

Tabor Mines and Mills Company reserves to itself the right at any time to satisfy and pay the said judgment and decree by paying to the parties of the second part the balance of the said eighteen thousand (\$18,000) dollars and interest as above specified, and that upon such payment and satisfaction the parties of the second part agree and bind themselves to enter of record a complete and full satisfaction and discharge of said judgment and decree."

The performance of this contract was entered upon, and the \$18,000 not having been paid within the eighteen months fixed by the contract, a new contract was made between the same parties on March 26, 1898, which, after setting out the foregoing agreement, proceeds:

"And, whereas, on the first day of February, 1898, there had been paid by The Ransom Leasing Company to the parties of the second part under and by virtue of the terms of the foregoing contract the sum of four thousand, five hundred and thirty and fifty-seven hundredths dollars (\$4,530.57), and there remains due and unpaid on said date to the said parties of the second part on said sum of eighteen thousand (\$18,000.00) dollars the sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths dollars (\$13,469.43);

"And, whereas, all the parties hereto are desirous of extending the time within which the said The Tabor Mines and Mills Company may pay or cause to be paid to the parties of the second part the balance due them;

"Now, therefore, in consideration of the premises, it is mutually agreed and understood by and between the parties hereto."

Then follow the same provisions as appear in the contract of August 11, 1896, as to the payment of royalty by The Ransom Leasing Company to the

parties of the second part, the computing of interest, the staying of legal proceedings between the parties, including the staying of all steps to sell the property covered by the decree of foreclosure. Then follows a new provision reading thus:

“And it is further agreed and understood that in the event that the royalties paid to the parties of the second part, as hereinbefore provided, within eighteen months from the date hereof shall not equal the sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths dollars (\$13,469.43) and interest as aforesaid, and in the event that the said The Tabor Mines and Mills Company shall within eighteen months from the date hereof fail to pay to the parties of the second part or their order the balance remaining due on said sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths (\$13,469.43) dollars and interest as aforesaid, then and in that event the parties of the second part shall have the right to proceed under the decree of foreclosure referred to, and sell or cause to be sold the premises described in said decree for the purpose of realizing the sum of money found to be due them in and by said decree less whatever amount may have been paid thereon under contract dated August 11, A. D. 1896, and under this contract.”

Then follow provisions the same as in the original contract as to suing out a writ of error by plaintiffs in error, and completing bill of exceptions. Also the same provision that any and all sums of money received by defendants in error on account of royalties from The Ransom Leasing Company should be considered as payments upon said judgment and decree, and shall in no event be recoverable of or from the parties of the second part. Then follows this provision, to wit:

“It is further agreed and understood that The Tabor Mines and Mills Company reserves to itself the right at any time within eighteen months from the date hereof to satisfy and pay the said judgment and decree by paying to the second party the balance of the said sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths (\$13,469.43) dollars and interest as above specified, and that upon such payment and satisfaction the parties of the second part agree and bind themselves to enter of record a complete and full satisfaction and discharge of said judgment and decree.”

At the expiration of the eighteen months prescribed in the contract of March 26, 1898, plaintiff in error not having paid the indebtedness stated therein, to wit, \$13,469.43, defendants in error advertised for sale, under the decree of June 11, 1896, the property covered thereby, to wit, the Matchless mine, for the purpose of collecting the balance due upon such decree after crediting thereon the royalties paid under the two contracts of August 11, 1896, and March 26, 1898. The notice of sale was dated December 2, 1899. The present action was instituted December 23, 1899, by the plaintiff in error (the judgment debtor in the judgment of June 11, 1896) to enjoin the sale, it taking the position that the contract of August 11, 1896, was an accord and satisfaction of the judgment of June 11, 1896, and that the contract of March 26, 1898, was an accord and satisfaction of the contract of August 11, 1896, and that upon its failure to comply with the contract of March 26, 1898, the only remedy that defendants in error had for the failure to pay the sum due from plaintiff in error to defendants in error was an action on the latter contract for damages.

If this contention be well made the judgment should be reversed; otherwise not.

Let us examine the provisions of the contract of August 11, 1896, and also the provisions of the contract of March 26, 1898. By the former defendants in error as parties of the second part agreed:

1. During the period of eighteen months running from the date of the contract, not to sell under the decree of foreclosure the property described therein.

2. To accept \$18,000.00 and costs of suit in satisfaction of the decree provided paid within time mentioned in the agreement, to wit, eighteen months.

3. That the royalties issuing from the lease of The Ransom Leasing Company which had been ordered paid into the court should be applied seven-eighths of them upon the \$18,000.00 and costs above mentioned, and one-eighth thereof to plaintiff in error, the party of the first part.

4. That the amounts paid to defendants in error on account of the royalties should not in any event be recoverable from them, but should be applied upon the judgment and decree.

Plaintiff in error agreeing:

1. Not to prosecute a writ of error to review the decree for the period of eighteen months from the date of the contract.

2. That the royalties mentioned should be applied as above stated, and whatever might be the issue of the contract they should be applied upon the judgment and decree, and not be recoverable from the parties of the second part.

3. That defendants in error should receive interest at the rate of one per cent. per month on the \$18,000, in lieu of the statutory rate of 8 per cent. per annum upon the amount adjudged against plaintiff in error by decree.

There was no obligation upon the part of plaintiff in error to pay the sum of \$18,000 except

through the application of the royalties issuing during the period of eighteen months out of the lease to The Ransom Leasing Company. The substance of this agreement was that the parties of the second part gave to the party of the first part the privilege for the period of eighteen months of discharging the amount of the decree by the payment of the sum of \$18,000.00 and interest thereon at the rate of one per cent per month, and the cost of suit. And all that the party of the first part obligated itself to do was that seven-eighths of the royalties above mentioned should be paid to the parties of the second part for the period of eighteen months for the satisfaction of the judgment. If the judgment should not be satisfied in the manner thus provided, the amount of royalties paid was to be applied upon the judgment, and the parties of the second part were to be entitled to proceed to sell thereunder to collect the amount due thereon.

The contract made was not in itself an accord and satisfaction of the judgment. It did not become such by performance, because not performed. It was but a privilege to the party of the first part to satisfy the judgment within the prescribed time in a certain manner and in a certain amount, and in default of this being done, the parties were relegated to their original rights under the judgment, and payments made under the contract to be credited upon the judgment and not to be recoverable in any event. The apparent expectation of the parties was that the royalties would amount to the \$18,000 interest and cost within the eighteen months, and that thereby the decree would be satisfied. But they fell short of this. They only amounted to \$4,530.57, being short the \$18,000 by the amount of \$13,469.43.

The parties to the original contract on March 26, 1898, for the purpose of extending it, entered

into a new contract of that date embodying the same terms as the original contract, except that it extended for the period of eighteen months the time of the payment of the balance then due under the contract of August 11, 1896, and contained the explicit provision that, in the event the amount named by the new contract was not paid within the time fixed thereby that the parties should be relegated to the original decree. The provision referred to being the following, to wit:

“That in the event the royalties paid to the parties of the second part, as hereinbefore provided, within eighteen months from the date hereof shall not equal the sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths dollars (\$13,469.43) and interest as aforesaid, and in the event that the said The Tabor Mines and Mills Company shall within eighteen months from the date hereof fail to pay to the parties of the second part or their order the balance due on said sum of thirteen thousand, four hundred and sixty-nine and forty-three hundredths (\$13,469.43) dollars and interest as aforesaid, then and in that event the parties of the second part shall have the right to proceed under the decree of foreclosure referred to, and sell or cause to be sold the premises described in said decree for the purpose of realizing the sum of money found to be due them in and by said decree, less whatever amounts may have been paid thereon under the contract dated August 11, A. D. 1896, and under this contract.”

The contracts, to wit, the one August 11, 1896, and the one of March 26, 1898, did not singly or together operate as an accord and satisfaction of the decree, they simply provided a means whereby the decree might be satisfied; but as the privilege was not availed of, the parties were thereupon rele-

gated according to express terms of last mentioned contract to their rights under the decree—that is to say, the amount of the original decree, together with interest at the rate of 8 per cent. per annum, should be credited with the royalties paid, and the parties of the second part—the judgment creditors—then be entitled to sell the property covered by the decree, to collect the balance thus ascertained to be due thereon. This the lower court properly permitted them to do, and its judgment should be affirmed.

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MAXWELL, J., not sitting.

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BILLS AND NOTES—Continued.

bank upon a bond of the holder of the notes, and second, to secure a note by the holder to plaintiff, and the bank agreed to collect said notes and so apply the proceeds, when the bank had collected sufficient money on said notes to satisfy the liability of the cashier and pay off plaintiff's note, plaintiff could maintain an action against the bank for the amount of his note, and he was not required to wait till the bond upon which the cashier was liable was actually paid off before bringing his suit.—*The Mercantile National Bank v. Peabody*, 455.

BILLS OF EXCEPTION: See APPELLATE PRACTICE.

BONDS:

Divorce and Alimony—Ne Exeat Bond—Action Upon Bond—Parties—Where in a suit for divorce and alimony by a wife against her husband a writ of ne exeat was issued against the defendant and he entered into bond, payable to the people, conditioned that he would not leave the jurisdiction of the court without leave of the court, an action upon the bond for breach of its condition was properly brought in the name of the people for the use and benefit of the wife.—*Marsellis v. The People for the use of Isabella M. Butter*, 258.

Same—Pleading—In an action upon a ne exeat bond an objection to the complaint that it does not definitely appear whether the principal in the bond left the jurisdiction before or after judgment was recovered against him in the action in which the writ of ne exeat was issued should be raised by motion and not by demurrer.—*Ib.*

Ne Exeat Bond—Action Upon—Breach of Condition—In an action upon a ne exeat bond for breach of the condition that the principal obligor, who was defendant in a suit for divorce and alimony would not leave the jurisdiction of the court without leave of the court, it is immaterial whether he left before or after judgment was rendered against him in the divorce suit, if he left without leave of court.—*Ib.*

Appeal from County to District Court—Defective Appeal Bond—New Bond—Where an appeal was prayed from the county to the district court by two joint defendants in a cause of which the district court had original jurisdiction, and the appeal bond was signed by only one of the defendants, upon motion to dismiss the appeal the district court properly allowed the defendants to file a new bond with the signatures of both defendants, and denied the motion to dismiss.—*Engel et al. v. Atkinson et al.*, 267.

BONDS—Continued.

Injunction—Action Upon Bond—Attorneys' Fees—Where an injunction was merely ancillary to the principal relief demanded in the action and a demurrer to the complaint and motion to dissolve the injunction were filed at same time and upon hearing the demurrer was sustained and the injunction dissolved, in an action upon the injunction bond to recover attorneys' fees in the matter of dissolving the injunction, the plaintiff is entitled to recover only the value of the attorneys' services rendered in securing the dissolution of the injunction and not for any services rendered in the preparation and trial of the main case, and, where the evidence was only as to the value of the entire services rendered in the case without any attempt to show what part was properly chargeable for services in securing the dissolution, the plaintiff was not entitled to recover.—*Church et al. v. Baker et al.*, 369.

BURDEN OF PROOF:

Life Insurance—Cause of Death—In an action upon a policy of life insurance where the defendant answered that death was caused by the intentional taking by deceased of an overdose of a narcotic drug, the burden is on the defendant to prove that the drug is a narcotic and that death was caused by an overdose thereof.—*The Denver Life Insurance Co. v. Price*, 30.

Sales—Warranties—Evidence—In an action for the price of goods purchased by a written contract or order where defendant answered that the goods were purchased upon certain representations and warranties which were not true, and the written evidence of the contract discloses no such representations or warranties, the burden is upon the defendant to prove them.—*The Colo. Dry Goods Co. v. W. P. Dunn & Co.*, 409.

Same—Action to Set Aside Trustee's Deed—Fraud—In an action by the holder of a note secured by a deed of trust to set aside a trustee's deed on the ground that the foreclosure by the trustee was without authority and fraudulent, and asking for foreclosure of the deed of trust, the burden of proof is upon the plaintiff to show the invalidity of the foreclosure sale.—*The Mosca Milling and Elevator Co. v. Murto*, 437.

CAVEAT EMPTOR:

Cities and Towns—Sewer Taxes—Tax Sales—The rule of caveat emptor applies to a purchaser at an invalid tax sale of a city lot for delinquent sewer taxes, and neither the purchaser nor his assignee of the tax sale certificate is entitled to

CAVEAT EMPTOR—Continued.

recover from the city the amount due upon such certificate.
—Elder et al. v. Fox et al., 263.

CHATTEL MORTGAGES:

Contract to Pay Debts of Mortgagor—Evidence—Where a merchant executed a chattel mortgage upon certain property in consideration of which the mortgagee assumed and promised to pay certain debts owed by mortgagor, the names of the creditors and the amounts owed to each, which the mortgagee assumed, being stated in the chattel mortgage, in an action by one of the creditors against the mortgagee for the amount stipulated and agreed to be paid to him, when plaintiff proved the contract in the chattel mortgage it was unnecessary to introduce further evidence to show that the mortgagor was indebted to plaintiff and the amount thereof, and error committed in the admission of secondary evidence as to the amount of such indebtedness was not prejudicial.—Taylor v. Ingersoll, 272.

Same—Acceptance—Where in consideration of a chattel mortgage the mortgagee assumed and agreed to pay certain debts of the mortgagor, notice to the mortgagee by one of the creditors that he accepted the terms of the contract and a subsequent suit thereon was a sufficient acceptance by such creditor.—Ib.

Appellate Practice—Abstract of Record—Replevin—On appeal from a judgment against the plaintiff in an action of replevin to recover possession of certain property under a chattel mortgage, where it appeared that the action was brought prior to the maturity of the note secured by the chattel mortgage and appellant's abstract contained neither the chattel mortgage, note or affidavit in replevin, nor anything showing what property was mentioned in the chattel mortgage or what condition had been broken, and in appellee's brief it was stated and not controverted by appellant that there was no evidence or contention in the trial court that any condition of the mortgage had been broken, also that it did not appear that the property in controversy was embraced in the mortgage or was the property of the mortgagor, the judgment must be affirmed.—Hart v. Peet, 284.

CITIES AND TOWNS:

Elections—Office of Mayor—Filling Vacancy—Mandamus—Under section 4488, Mills' Ann. Stats., providing that in case

CITIES AND TOWNS—Continued.

a vacancy occurs in the office of mayor of a city, the city council shall order a special election as soon as practicable to fill the vacancy, it is the duty of the city council to order such special election at its first regular session after a vacancy occurs, and in case of a failure or refusal to do so mandamus will lie to compel them to order such election.—*Rizer et al. v. The People*, 40.

Same—Election Expenses—Where a vacancy occurs in the office of mayor of a city, the fact that the last annual appropriation for election expenses was exhausted by the general election which followed it, is no valid reason for the city council refusing to order a special election to fill the vacancy.—*Ib.*

Same—Demand—Where a city council failed to order a special election to fill a vacancy in the office of mayor as required by statute, no formal demand on the council to order such election was necessary before commencing an action of mandamus to compel them to do so.—*Ib.*

Same—Relators—Where a city council fails to order a special election to fill a vacancy in the office of mayor as required by statute, mandamus may be instituted to compel them to do so upon the relation of private citizens.—*Ib.*

Mandamus—Pleading—Appropriation—A petition for a writ of mandamus to compel the board of trustees of an incorporated town to allow a claim of the petitioner against the town for coal furnished to the town and to order a warrant drawn for its payment which fails to allege that a previous appropriation had been made concerning such expense is fatally defective.—*The Board of Trustees of The Town of Montrose v. Endner*, 65.

Negligence—Public Streets—Where a fireplug, very near the beaten roadway of a street and at a point in the roadway where vehicles could not pass without one turning out of the beaten way was permitted to become concealed by growing weeds and vegetation, and the city had knowledge of the condition which rendered the fireplug dangerous to travelers on the street, the city was guilty of negligence in permitting vegetation to conceal the plug and is liable for injuries to a person caused by his vehicle coming in collision with said fireplug without any negligence on his own part while driving along the street.—*Thunborg v. The City of Pueblo*, 80.

Same—Contributory Negligence—Instructions—In an action against a city for injuries to plaintiff caused by his vehicle while driving along a public street coming in contact with a concealed and dangerous fireplug, where defendant claimed that the injury

CITIES AND TOWNS—Continued.

was the result of plaintiff's own negligence in driving along the street at a furious and unlawful rate of speed, an instruction that if the jury found from the evidence that plaintiff was traveling at a furious and rapid rate of speed and that such act was the cause of the injury it was immaterial whether such traveling was intentional or the result of his inability to restrain his horse he was guilty of contributory negligence and could not recover, was erroneous.—Ib.

Negligence—Instructions—Defect Cured—In an action against a city an instruction that the city was "bound to use all reasonable care, caution and supervision to keep its streets and sidewalks in safe condition for travel, in the ordinary modes of travel," was not misleading because it failed to qualify the word "safe" with the word "reasonably." But if it was faulty it was cured by a subsequent instruction in which the accurate phraseology was employed.—*The City of Denver v. Murray*, 142.

Negligence—Notice—Instructions—In an action against a city where the undisputed facts showed that the dangerous obstruction of the street complained of had existed for such a length of time that the city was charged by law with notice and with the duty of removing it, and it would have been proper to so instruct the jury, the city is not in a position to complain of an instruction given upon the question of notice.—Ib.

Obstruction of Streets—Instructions—In an action against a city for an injury caused by the falling of a derrick where the undisputed evidence showed that the derrick stood in the street in close proximity to a schoolhouse and was attractive to the school children, who were in the habit of playing upon it, it was not erroneous for the court to refer to the derrick as "said obstruction."—Ib.

Same—In an action against a city for injuries to a child caused by the falling of a derrick which had been left standing in the street in close proximity to a school which was attended by plaintiff for at least a year, and which was attractive to the children to play upon, the fact that the derrick was tied to a stump by a rope which was liable at any time to be severed accidentally or heedlessly by the children playing upon it did not palliate the negligence of the city in failing to have it removed, and it was not error for the court to instruct the jury that it was immaterial whether or not it was tied.—Ib.

Trustees—Mayor pro Tem.—Right to Vote—A member of the board of trustees of an incorporated town while presiding over the sessions of the board as mayor pro tem. is entitled to vote

CITIES AND TOWNS—Continued.

upon all questions whether or not there is a tie, and the appointment of a town marshal by the board of trustees was legal although it required the vote of the mayor pro tem. to constitute the necessary number to elect.—*Harris v. The People*, 160.

Appellate Practice—Jurisdiction of Court of Appeals—Special Proceedings—The statute conferring jurisdiction upon the court of appeals to review the final judgments of inferior courts in civil cases applies only to final judgments or decrees in actions at law or suits in equity, and does not apply to special statutory proceedings. The court of appeals has no jurisdiction to review a judgment of the county court in a proceeding under the act (Session Laws 1901, page 386) providing for the disconnection of outlying territory from cities and towns.—*The Town of Fletcher v. Smith*, 201.

Franchises—Sewers—Statutory Construction—Section 4403, subdivision 10, Mills' Ann. Stats., authorizing cities and towns to construct sewers, regulate their use and to make special assessments against adjacent lots and lands for the purpose of such construction, limits the powers of municipal corporations in relation to sewers to those expressed in said subdivision. An ordinance purporting to grant to a private person an exclusive right and privilege to construct and operate a system of sewers within the limits of a municipal corporation and to collect from all persons using the same a reasonable annual compensation for connecting therewith is absolutely void, and one constructing a sewer system under such ordinance cannot maintain an action against an inhabitant of the city for the use of the same.—*Weaver et al. v. The Canon Sewer Co.*, 242.

Sewers—Invalid Ordinance—Pleading—Evidence—In an action by a sewer company against an inhabitant of a town to recover compensation for the use of its sewer system, where plaintiff's ownership was denied and plaintiff relied upon an ordinance as the source of its title, defendant could avail himself of the invalidity of the ordinance in defense without having specially pleaded the same.—*Ib.*

Sewer Taxes—Failure to Record Tax Sales—Estoppel—Where a special sewer tax was assessed against a city lot but no record thereof was made either in the office of the county treasurer or county clerk, and twelve years after such assessment was made the city attempted to enforce its lien by causing said lot to be sold for said tax, the city was estopped to assert its tax lien as against a purchaser of the lot who purchased without notice of such tax and after an examination of the records for

CITIES AND TOWNS—Continued.

tax liens, and who received no notice of the tax or the tax sale until the purchaser at the tax sale applied for a deed upon his tax sale certificate. The holder of the tax sale certificate was not entitled to a deed and the tax lien and certificate should be annulled.—*Elder et al. v. Fox et al.*, 263.

Sewer Taxes—Tax Sales—Caveat Emptor—The rule of caveat emptor applies to a purchaser at an invalid tax sale of a city lot for delinquent sewer taxes and neither the purchaser nor his assignee of the tax sale certificate is entitled to recover from the city the amount due upon such certificate.—*Ib.*

Incorporation—Contesting Validity—Jurisdiction—Mandamus—In a proceeding to incorporate a town the county court has not jurisdiction to consider a protest against the incorporation on the ground that the petitioners for incorporation are not land owners as contemplated by law. And where a county judge refused to furnish the petitioners a certified copy of such proceeding to be filed in the recorder's office, on the ground that subsequent to holding the election and publishing the result a protest had been filed, mandamus will go to compel him to certify the proceeding.—*Eldred v. Johnson*, 384.

CLAIMS AGAINST COUNTIES:

Disallowance in Part—Accepting Warrant—Notice—Appeal—Where a claim against a county was disallowed in part and a warrant was issued for the amount allowed as in full payment of the claim, and the claimant received the warrant without any knowledge that it was conditioned as in full of his claim, he was not precluded from a recovery of the balance of his claim against the county. The fact that he afterwards appealed from the action of the board disallowing part of his claim is not of itself sufficient to charge him with knowledge of the condition attached to his acceptance of the warrant.—*The Board of County Commissioners of Garfield County v. Beardsley*, 55.

District Attorneys—Assistants—Power of Court to Appoint—Compensation—The district court has inherent power, in the exercise of a proper discretion, to appoint counsel to assist the district attorney in the prosecution of criminal cases, subject to review in the appellate courts for the abuse of such discretion, and such assistant is entitled to compensation for his services to be paid by the county charged with the payment of the expenses of such prosecution.—*The Board of County Commissioners of Hinsdale County v. Crump*, 59.

CLAIMS AGAINST COUNTIES—Continued.

Same—Value of Services—Allowance by Court—Evidence—Where counsel was appointed by the district court to assist the district attorney in the prosecution of a criminal case, an allowance by the court of compensation to such counsel for his services is at least prima facie evidence of the value of the services.—Ib.

Same—Verification of Claim—Where counsel was appointed by order of the district court to assist the district attorney in the prosecution of a criminal case and an allowance made by the court for his services, in presenting the claim to the board of county commissioners for allowance, it is not necessary that it be verified by the affidavit of the claimant, but the claim is sufficiently proven by a certified copy of the order making the appointment.—Ib.

Action by Board of County Commissioners—Suit—It is not a valid objection to a suit against a county, that it was brought before the commissioners had finally acted on the claim where between the time of filing the claim with the commissioners and the bringing of the suit eight meetings of the board of commissioners had been held.—Ib.

Assistant District Attorney—Pleading—Amendment—Departure—Where counsel was appointed to assist the district attorney to prosecute a criminal case and brought an action against the county to recover compensation for his services and alleged in his original complaint that he was appointed and acted as "special prosecutor" in the case mentioned, an amendment by interlineation by striking out the words "special prosecutor" wherever they occurred and inserting instead "to assist the district attorney" was not a departure from the original cause of action.—Ib.

Irrigation—Water Divisions—Counties Liable for Compensation of Superintendent—All counties which contain lands that are irrigated by water taken from any one or more of the streams mentioned in the act creating a water division are embraced within the division and are each liable for their respective shares of the compensation of the superintendent of irrigation for that division whether or not such lands are irrigated through ditches whose priorities have been established by judicial decree. But if a county has no land within it which is irrigated by water from such stream or streams it is not liable for any part of the superintendent's compensation although it may contain lands lying within the course or watershed of

CLAIMS AGAINST COUNTIES—Continued.

such stream or streams.—*Chew v. The Board of County Commissioners of Fremont County*, 162.

CONTINUANCE:

Absent Witness—An application for a continuance on account of an absent witness who resides in a different county from that of the trial is insufficient unless it appears that an order of court has been obtained authorizing service of a subpoena outside of the county where the trial is had.—*Abby v. Dexter*, 498.

Same—An application for a continuance on account of an absent witness is insufficient where the affidavit fails to allege that there are no other witnesses by whom the facts can be proven. A statement that "affiant knows of no other witnesses by whom said facts can be proven, whose testimony can be so readily procured" was not sufficient.—*Ib.*

CONTRACTS:

Easements—Parol—Water Rights—A parol contract whereby plaintiff was to construct a ditch through the land of defendant and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch.—*Croke v. The American National Bank*, 3.

Same—Notice—Where one has an easement in a ditch through the lands of another based on an oral contract and had been in open visible use of the ditch for irrigation purposes for several years up to the time the land was sold without any exception of the easement, the purchaser took the land charged with notice of the easement and subject thereto.—*Ib.*

Pleading—Principal and Subcontractors—A complaint which alleges that plaintiffs made an agreement with the contractor who was constructing a building for defendant to furnish the material and plaster the building for a certain price and that before they commenced work defendant agreed with plaintiffs that if they would do said plastering and furnish material therefor, he would pay plaintiffs the sum agreed on by plaintiffs and the contractor, states a cause of action against defendant as owner and in favor of plaintiffs as principal contractors.—*Harris et al. v. Harris*, 34.

Judgments—Parties—Mechanics' Liens—In an action for a personal judgment against the owner and to enforce a mechanic's lien on real estate where plaintiffs claimed under a

CONTRACTS—Continued.

contract originally made with a contractor under defendant, but which defendant assumed and made his own contract before plaintiffs commenced work thereunder, and in which action said contractor was joined as a party defendant, the fact that no final disposition was made of the case as to said contractor would not affect the validity of a personal judgment against the owner or a lien decreed upon the real estate.—*Ib.*

Negotiable Instruments—Indorsement—An indorsement of a negotiable instrument is not only a transfer of the instrument but is an original, independent contract by which the indorser is regarded as promising to pay at the place where the indorsement is made in the event of dishonor and due notice.—*Sullivan et al. v. The German National Bank et al.*, 99.

Negotiable Instruments—Bank Certificates of Deposit—Indorsement—Gaming—Lex Loci—Where a certificate of deposit in a Colorado bank was indorsed in another state by the payee in payment of a gaming debt which was again indorsed and passed into the hands of an innocent purchaser, the original indorser cannot avoid liability on his indorsement under section 1344, Mills' Ann. Stats., making all gaming contracts void, and in the absence of a showing of a statute of the state where the indorsement was made which would invalidate his indorsement, he will be held liable thereon.—*Ib.*

Principal and Agent—Insurance—In an action by an insurance company against its local agent to recover premiums collected to its use, a counterclaim by defendant alleging a contract whereby plaintiff agreed in case it withdrew from the insurance business in defendant's territory nothing should be done to disturb the business on defendant's books, but that defendant should have the option to reinsure all of its business in other companies or to take up all policies then in force at pro rata premiums less the cost of obtaining the same, and a breach of said contract whereby plaintiff without defendant's knowledge or consent retired from business in defendant's territory and caused its business to be reinsured by another insurance company without notice to defendant and without giving him an opportunity to exercise his option as provided in the contract, states a cause of action against the insurance company.—*Appelman v. The Broadway Insurance Co.*, 110.

Liens—Sales—Where the owners of certain mining claims contracted with attorneys to pay them a certain fee for services connected with said claims and agreed to pay the same out of the purchase money to be received from the sale of said pro-

CONTRACTS—Continued.

perty, a certain per cent. of said purchase money to be paid to said attorneys as it was received and the balance of their stipulated fee to be paid when the final payment was made of the purchase price, and providing that said attorneys were "to receive and be interested in the purchase money on said mine to the extent of" the designated sum, the contract did not create a lien on said mining claims, nor operate to transfer an interest in the purchase money until after it should come into the hands of the vendors, and no right of action accrued in favor of said attorneys against the purchasers of said mining claims who purchased with notice of such contract.—*Weiss et al. v. Gullett et al.*, 122.

Gambling Contracts—Bank Certificate of Deposit—Indorsement—Under section 1344, Mills' Ann. Stats., an indorsement and transfer of a bank certificate of deposit in payment of money lost at gaming is absolutely void and vests no title to the certificate even in an innocent purchaser.—*The Western National Bank v. The State Bank*, 128.

Deeds—Consideration—Parol Agreement—The fact that a deed recites a certain sum as the whole consideration and acknowledges the receipt thereof will not prevent the grantor from recovering an additional consideration upon an oral agreement of the grantee even though such additional consideration was dependent upon the happening of a contingency, if it were such as not to defeat or impair the operation of the conveyance.—*Cheesman v. Nicholl*, 174.

Same—Receipts—Where at the time of the execution and delivery of a deed to real estate the grantee by parol agreed to pay the grantor a certain sum in addition to the consideration recited in the deed if the grantee should ever utilize the property for any purpose and the grantee did utilize the property for a reservoir, the grantor could maintain an action for the additional consideration. And the fact that at the time of delivering the deed the grantor executed a separate receipt in which he acknowledged payment in full of all that was due would not defeat his action for the additional amount that afterwards became due upon the utilization of the property by the grantee.—*Ib.*

Conveyances—Consideration—Parol Agreement—Instructions—Evidence—In an action by a grantor against a grantee to collect an additional consideration over and above that recited in the deed upon an oral promise of the grantee, an instruction which told the jury that the written instruments were presumed

CONTRACTS—Continued.

to contain all the agreements of the parties and that the burden was upon the plaintiff to establish the oral agreement by a preponderance of evidence and that the evidence must be so clear as to satisfy the jury that such agreement was made, was sufficient. It was not the duty of the court to require the jury to find the establishment of the parol agreement beyond a reasonable doubt.—1b.

Principal and Agent—Commission—Offer and Acceptance—Defendant by oral instructions authorized plaintiff, her agent, to dispose of certain real estate for a certain amount in cash and an exchange of certain real estate belonging to the proposed purchaser, defendant to assume an encumbrance existing on the property to be taken by her in exchange and the purchaser to assume an encumbrance existing on defendant's property, the principal sum of the encumbrance being named in each case. Plaintiff submitted the proposition to the proposed purchaser who accepted by wire, directing that his attorney prepare the contract of sale which would be signed by his agent and that the contract should make the deal subject to perfect titles and interest on encumbrance, rents and insurance in each case to be adjusted to date of contract. Defendant refused to consummate the sale. Held, that defendant's oral proposition implied that if accepted the agreement should be made effective by being reduced to writing; that the term "perfect title" used in the acceptance was synonymous with marketable title, and that defendant's proposition implied that the titles should be marketable; that defendant's proposition naming the principal of the encumbrance in each case implied that each party should pay the interest on their respective encumbrances up to the date of the contract, and the law implied that each party was entitled to collect rent on his or her property and should bear the expense of insurance, if any, up to the time of the contract of sale. That the acceptance of defendant's offer was unqualified, and the proposed purchaser being ready, willing and able to comply with the terms of the proposition, defendant was liable to plaintiff for commission.—*Ross v. Smiley*, 204.

Written and Parol—Variance—Evidence—A written contract whereby plaintiff agreed to establish a store and boarding house at defendant's mining camp and to furnish supplies and board to defendant's employees, and in which defendant agreed to aid plaintiff in collecting board and store accounts from its employees, without specifying how such aid was to be rendered, was not varied by a subsequent oral contract wherein defendant

CONTRACTS—Continued.

agreed to pay the board and store accounts of its employees to plaintiff and deduct the same from their wages, and in an action by plaintiff against defendant to recover such accounts the verbal contract was admissible in evidence.—*The Cerrusite Mining Co. v. Steele*, 216.

Statute of Frauds—Promise to Pay Debt of Another—Pleading—In an action upon an oral contract the defense that it was an agreement to answer for the debt of another and void under the statute of frauds because not in writing is not available to defendant unless the statute be pleaded.—*Ib.*

Same—Money Had and Received—Where defendant agreed to pay the board and store bills of its employees to plaintiff and to deduct the same from their wages and did deduct from their wages the amount of such bills, the amounts thus deducted became so much money received by defendant to plaintiff's use and the debt became defendant's own and it cannot interpose as a defense thereto that it was an agreement to answer for the debt of another.—*Ib.*

Employment by Year—Evidence—Custom—In an action by a traveling salesman against a wholesale merchant for balance of his salary under a contract of employment "for a period of one year for the season commencing December 1st," where defendant contended that plaintiff had not worked out the entire year, evidence of the known custom of trade in that line of business was admissible to show what constituted the season for traveling salesmen and when such season ended.—*The Johnson-Woodbury Hat Co. v. Lightbody*, 239.

Acceptance—Where in consideration of a chattel mortgage the mortgagee assumed and agreed to pay certain debts of the mortgagor, notice to the mortgagee by one of the creditors that he accepted the terms of the contract and a subsequent suit thereon was a sufficient acceptance by such creditor.—*Taylor v. Ingersoll*, 272.

Evidence—Joint Liability—Request for Services—In an action against three defendants for services alleged to have been performed at defendants' request where the evidence fails to show that one of the defendants, either individually or jointly with his codefendants made any request of plaintiff to perform the services in question, a judgment against all three defendants is erroneous and must be reversed.—*Johnson et al. v. Lawson*, 297.

Same—Estoppel—In an action against three defendants for services performed where one of the defendants did not employ plaintiff nor authorize his employment and had no interest in the

CONTRACTS—Continued.

work performed by him, in order to sustain a judgment against such defendant on the ground that he led plaintiff to believe that he was one of the parties employing him and plaintiff having relied thereon said defendant was estopped to deny that he was one of said parties, the evidence of the representations of such defendant upon which plaintiff acted must be plain and certain.—Ib.

Deeds—Assumption of Encumbrance of Grantee—Plaintiff and J. exchanged real estate. At the request of a real estate agent who acted for J. the deed was made by plaintiff to defendant and contained a clause whereby the grantee assumed the payment of a mortgage encumbrance thereon. Defendant had no interest in the transaction and her name was inserted as grantee without her knowledge or consent. The real estate agent placed the deed on record and notified defendant of the use of her name as grantee but said nothing about the assumption of the mortgage. Afterwards the real estate agent prepared a deed which defendant executed conveying the land to another party. The mortgage was foreclosed and failing to sell for enough to pay the mortgage plaintiff was compelled to pay the balance. Held, that defendant was not liable on the agreement in the deed to assume the mortgage and plaintiff could not recover in an action against defendant for the amount he was compelled to pay.—Gill v. Robertson, 313.

Estates of Decedents—Executors—Power to Sell Land—Employment of Agent—Commission—Where a will empowers an executor to sell land the executor has power to employ an agent to aid him in effecting such sale and to contract to pay the agent commission, and an agent so employed who effects a sale may maintain an action against the executor as such for his commission. The amount of commission that an executor may contract to pay an agent is not limited by section 4805, Mills' Ann. Stats., prescribing the compensation of executors for selling land.—Ingham v. Ryan, 347.

Lease—Accord and Satisfaction—Option—Defendant being indebted to plaintiff, executed to him a lease on a mine for three months with an option to continue for six months. Plaintiff agreed to apply the royalties coming to defendant as they became due on the indebtedness until the debt should be fully paid and agreed to accept that method of payment of all of defendant's liability. Plaintiff operated the mine for three months and credited the royalties as agreed, but they were insufficient to pay the defendant's debt. Held, that the contract

CONTRACTS—Continued.

of lease was not an accord and satisfaction of the defendant's debt but that at its termination the plaintiff might sue for the unpaid balance and he was not required to exercise his option of working the mine three months longer before he could bring his action.—*The Boston Newmarket Gold Mining Co. v. Orme*, 359.

Rescission—Fraud—Pleading—Appellate Practice—In an action to rescind a contract for the purchase of land and to recover back the purchase price placed in escrow where the sole ground for the rescission alleged in the complaint was the fraudulent representations of the seller, and the cause was tried upon that theory, the appellate court will not consider an argument based on the point that the contract being verbal and executory could be rescinded by either party at his pleasure and as a matter of right.—*Muir v. Pratt et al.*, 363.

Rescission—Fraudulent Representations—In an action to rescind a contract to purchase land and to recover back the purchase price on the ground of deceit and false and fraudulent representations by the seller as to the location of the land, the crops it would grow and the depth at which water could be procured, where the evidence shows that plaintiff went upon and examined the premises before purchasing and that the only statements made by the seller as to the crops it would grow and the depth at which water could be found were mere expressions of opinion based on the crops grown and the depth of water on adjacent lands, the court properly directed a verdict for defendant.—*Ib.*

Mines and Mining—Lease—Assignment—Consideration—Where a mining lease for a certain term was assigned, the assignee agreeing to work the mine and to pay the consideration out of the net proceeds, he was not required to work the mine continuously through the entire term of the lease at a loss, or else become absolutely liable for the amount of the consideration, but his obligation was fulfilled when he worked the mine sufficiently to show that it could not be worked at a profit. And where the assignment contained no provision against subletting, the assignee by reassigning the lease did not violate his contract nor put it out of his power to comply with it so as to make him absolutely liable for the amount of the consideration.—*Caley v. Portland et al.*, 390.

Statute of Frauds—Promise to Pay Debt of Another—Landlord and Tenant—Where plaintiff sold to a tenant goods and charged them upon his books to such tenant, a promise by the landlord to pay such account, made without consideration, was a

CONTRACTS—Continued.

promise to pay the debt of another within the statute of frauds, and was not binding unless made in writing.—*Burson v. Bogart*, 449.

Same—Instructions—Not Based on Evidence—Where defendant verbally promised to pay to plaintiff the store account of his tenant after the goods had been sold and charged to the tenant, and there was no evidence of any consideration passing from plaintiff to defendant or that plaintiff released the tenant and accepted defendant as his debtor, an instruction to the effect that where there is a consideration for the promise to pay, it is unnecessary for it to be in writing and that to warrant a finding for plaintiff it must appear that he accepted defendant and released the tenant, was prejudicial error.—*Ib.*

Pleading—In an action upon a written contract the complaint may allege the contract according to its legal effect or by setting it out in *haec verba*.—*Abby v. Dexter*, 498.

Pleading—Demand—In an action upon a contract to pay money an allegation that defendant failed and refused to pay the money is a sufficient allegation of demand, especially in the absence of a demurrer, and where it is apparent from the answer that a demand would have been unavailing.—*Ib.*

Option to Pay in Land or Money—Time—Defendant by contract dated January 10, 1893, stipulated to pay plaintiff a certain amount by the conveyance of certain land within the year 1893, and in case of failure to convey the land within the time stipulated, defendant was to become immediately upon the expiration of one year from date of the contract personally indebted to plaintiff for the sum stated. Held, that the time within which defendant had a right to pay the debt by the conveyance of land expired on December 31, 1893, and not on January 10, 1894.—*Ehrich v. Durkee*, 502.

Option to Pay in Land—Demand for Conveyance—Description—Where defendant contracted to pay plaintiff a certain sum with an option to pay by the conveyance of land within a certain time, the land to be selected by plaintiff, a demand by plaintiff, within the time, for a conveyance in which the land was described by definite boundaries on the south, east and west, and called for a line on the north parallel with the south line, and the width of the tract from north to south to be such as was necessary to make the amount of land he was entitled to under the contract, contained a sufficiently definite description of the land to form the basis of a deed.—*Ib.*

CONTRACTS—Continued.

Option to Pay in Land—Absolute Liability—Where defendant upon a valuable consideration contracted to pay a debt due to plaintiff by a conveyance to plaintiff of certain land within a certain time and in case of failure to convey to plaintiff the land within the time limited, defendant to become personally indebted to plaintiff, upon a failure by defendant to convey the land within the time he became absolutely liable to pay plaintiff the sum stipulated in money, and not merely such damages as plaintiff might have sustained, and the fact that the debt was originally the debt of another does not alter the relations of the parties to the contract.—*Ib.*

Attorneys' Liens—Waiver—An agreement between an attorney and his clients whereby the attorney at a sale of land, under a decree obtained by him for his clients, was to purchase the property in trust for his clients and sell the same, and out of the proceeds pay his fee and costs, was a waiver of his attorney's lien.—*Teller v. Hill*, 509.

Judgments—Accord and Satisfaction—Defendants having a judgment against plaintiff with a decree of foreclosure on plaintiff's mine, entered into a contract with plaintiff whereby defendants agreed to accept within a certain time a certain sum with interest in satisfaction of the judgment, and plaintiff's lessee was to pay to defendants a certain part of the royalties due plaintiff under the lease as such royalties fell due, to be applied on the sum agreed to be paid in satisfaction of the judgment, and in any event the amounts so paid to be credited on the judgment and not to be recoverable back by plaintiff and the parties agreed to stay further legal proceedings for the time mentioned, the defendant to forbear the enforcement of his foreclosure decree, and plaintiff agreed to sue out no writ of error during the time; and the sum agreed on not having been paid within the time, another contract was executed extending the time for payment with a stipulation if not paid within the time as extended defendants were to be relegated to their rights under the decree. Held, that the contracts were not an accord and satisfaction of the judgment and decree and that the amount agreed on not having been paid within the time, defendants could proceed to foreclose for the amount of the judgment less the payments made under the contracts.—*The Tabor Mines and Mills Co. v. Newell*, 520.

CONTRIBUTORY NEGLIGENCE: See **NEGLIGENCE.**

CONVEYANCES:

Easements—Evidence—Estoppel—Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.—*Croke v. The American National Bank*, 3.

Easements—Water Rights—An easement such as the right to use an irrigating ditch to carry water for the purpose of irrigating land will pass as an appurtenance to the land without specific mention in the deed if such was the intention of the grantor, and the deed being silent such intention may be gathered from the presumptions arising from the circumstances surrounding the transaction.—*The American National Bank v. Hoeffler*, 53.

Same—A. owned two separate tracts of land and constructed a ditch across one tract to carry water for the purpose of irrigating the other. A. conveyed both tracts to S. but by separate deeds and at different times and without specific mention of the ditch. S. conveyed the tract irrigated by the ditch to H., and several years later conveyed the land across which the ditch was constructed to plaintiff, and H. conveyed with all the appurtenances the tract so irrigated to defendant. None of the deeds specifically mentioned the ditch. During the ownership of A., S. and H. the ditch was continuously, openly and visibly used to irrigate the land passed to defendant. Held, that the circumstances surrounding the conveyances raised a reasonable presumption that it was the intention of each of the grantors to convey the easement in the ditch, and under such presumption defendant was the owner of such easement, and that it was error to enjoin defendant from using the same.—*Ib.*

Deeds—Consideration—Parol Agreement—The fact that a deed recites a certain sum as the whole consideration and acknowledges the receipt thereof will not prevent the grantor from recovering an additional consideration upon an oral agreement of the grantee even though such additional consideration was dependent upon the happening of a contingency, if it were such as not to defeat or impair the operation of the conveyance.—*Cheesman v. Nicholl*, 174.

CONVEYANCES—Continued.

Same—Receipts—Where at the time of the execution and delivery of a deed to real estate the grantee by parol agreed to pay the grantor a certain sum in addition to the consideration recited in the deed if the grantee should ever utilize the property for any purpose and the grantee did utilize the property for a reservoir, the grantor could maintain an action for the additional consideration. And the fact that at the time of delivering the deed the grantor executed a separate receipt in which he acknowledged payment in full of all that was due would not defeat his action for the additional amount that afterwards became due upon the utilization of the property by the grantee.—Ib.

Consideration—Parol Agreement—Instructions—Evidence—In an action by a grantor against a grantee to collect an additional consideration over and above that recited in the deed upon an oral promise of the grantee, an instruction which told the jury that the written instruments were presumed to contain all the agreements of the parties and that the burden was upon the plaintiff to establish the oral agreement by a preponderance of evidence and that the evidence must be so clear as to satisfy the jury that such agreement was made, was sufficient. It was not the duty of the court to require the jury to find the establishment of the parol agreement beyond a reasonable doubt.—Ib.

Mortgages—Foreclosure—Sheriff's Deed—Order of Court Approving Sale—A sheriff's deed made in pursuance of the certificate of sale on the foreclosure of a mortgage is not void because no order of court approving the sale was made prior to the execution of the deed.—*De Cunto, Barra & Co. v. Johnson*, 220.

Contracts—Deeds—Assumption of Encumbrance of Grantee—Plaintiff and J. exchanged real estate. At the request of a real estate agent who acted for J. the deed was made by plaintiff to defendant and contained a clause whereby the grantee assumed the payment of a mortgage encumbrance thereon. Defendant had no interest in the transaction and her name was inserted as grantee without her knowledge or consent. The real estate agent placed the deed on record and notified defendant of the use of her name as grantee but said nothing about the assumption of the mortgage. Afterwards the real estate agent prepared a deed which defendant executed conveying the land to another party. The mortgage was foreclosed and failing to sell for enough to pay the mortgage plaintiff was com-

CONVEYANCES—Continued.

pelled to pay the balance. Held, that defendant was not liable on the agreement in the deed to assume the mortgage and plaintiff could not recover in an action against defendant for the amount he was compelled to pay.—*Gill v. Robertson*, 313.

Fraud—Limitation—The owner of a lot without consideration deeded it to his wife. Afterwards with the knowledge and consent to his wife he deeded the same lot to plaintiff in consideration that plaintiff should pay off certain encumbrances on the lot. Plaintiff had no knowledge of the deed to the wife at the time plaintiff accepted the deed from the husband. Plaintiff paid off the encumbrance and went into possession and made valuable improvements on the lot. Afterwards the wife deeded the lot without consideration to another party who executed a trust deed thereto to the wife. Held, that in an action by plaintiff against the husband and wife, the wife's grantee and the trustee in the deed of trust, to quiet title, limitation would begin to run from the time the wife deeded the property to another party and not from the date of the deed to plaintiff.—*Arnett v. Berg et al.*, 341.

Contracts—Option to Pay in Land or Money—Time—Defendant by contract dated January 10, 1893, stipulated to pay plaintiff a certain amount by the conveyance of certain land within the year 1893, and in case of failure to convey the land within the time stipulated, defendant was to become immediately upon the expiration of one year from date of the contract personally indebted to plaintiff for the sum stated. Held, that the time within which defendant had a right to pay the debt by the conveyance of land expired on December 31, 1893, and not on January 10, 1894.—*Ehrich v. Durkee*, 502.

Contract—Option to Pay in Land—Demand for Conveyance—Description—Where defendant contracted to pay plaintiff a certain sum with an option to pay by the conveyance of land within a certain time, the land to be selected by plaintiff, a demand by plaintiff, within the time, for a conveyance in which the land was described by definite boundaries on the south, east and west, and called for a line on the north parallel with the south line, and the width of the tract from north to south to be such as was necessary to make the amount of land he was entitled to under the contract, contained a sufficiently definite description of the land to form the basis of a deed.—*Ib.*

Contracts—Option to Pay in Land—Absolute Liability—Where defendant upon a valuable consideration contracted to pay a debt due to plaintiff by a conveyance to plaintiff of certain

CONVEYANCES—Continued.

land within a certain time and in case of failure to convey to plaintiff the land within the time limited, defendant to become personally indebted to plaintiff, upon a failure by defendant to convey the land within the time he became absolutely liable to pay plaintiff the sum stipulated in money, and not merely such damages as plaintiff might have sustained, and the fact that the debt was originally the debt of another does not alter the relations of the parties to the contract.—Ib.

Statute of Uses—Trusts—The statute of uses (27 Henry VIII, chap. 10) is in force in Colorado, and where land is conveyed to one person for the use of or in trust for others, by a deed which expresses a mere passive trust, the legal as well as the equitable title vests thereby in the cestuis que trust and the trustee takes nothing.—Teller v. Hill, 509.

Same—Judgment Liens—Where land was deeded to one person for the use of others by a deed which merely expressed a passive trust and such deed was recorded, a title in fee was thereby vested in the cestuis que trust, and a transcript of judgment against the cestuis que trust being filed, the judgment lien thus created in favor of the judgment creditors was superior to any secret lien or trust existing in favor of the trustee created by oral agreement between the trustee and the cestuis que trust of which the judgment creditors had no notice.—Ib.

Same—Attorneys' Liens—Where land was conveyed to a trustee for the use of other parties by a deed which expressed a mere passive trust, which deed was recorded, a judgment lien created by filing a transcript of judgment against the cestuis que trust was superior to an attorney's lien in favor of the trustee of which the judgment creditors had no notice.—Ib.

CORPORATIONS:

Annual Reports—Liability of Directors—The failure of a corporation to file the annual report as required by section 491, Mills' Ann. Stats., renders the directors of the corporation personally liable for all debts contracted within the year next preceding the time when it should have been filed unless the capital stock of the corporation has been fully paid up and a certificate of that fact made and filed. Upon the expiration of the time without the filing of such report a right of action at once accrues in favor of a creditor against the directors and the fact that the capital stock had been fully paid in and a certificate of that fact made within the time but which was not filed until six days after the expiration of the time within

CONVEYANCES—Continued.

which the report was required to be filed, would not relieve the directors of the liability.—*Cannon et al. v. The Breckenridge Mercantile Co.*, 38.

Bankruptcy—Property Subject to Debts of Bankrupt—Husband and Wife—Where a bankrupt merchant became manager of a mercantile company and by his knowledge and skill in the management and control of the business of the corporation greatly enhanced the value of the capital stock of the corporation, the creditors of such bankrupt are not entitled to the enhanced values imparted to said stock by his services. Nor does the fact that the wife of said bankrupt was the principal owner of the stock of the corporation alter the situation.—*Campbell v. Thompson et al.*, 93.

Ultra Vires—Injunction—Suit by Stockholder—A stockholder of a corporation cannot maintain an action to enjoin the foreclosure of a deed of trust to corporate property executed by the president and secretary of the corporation, on the ground that it was executed without authority and for the private benefit of the president without first showing that proper effort had been made to have the action brought by the corporation and that the officers of the corporation had refused to bring the action, and that he had also exhausted all reasonable efforts to obtain relief through the stockholders as a body or that such efforts would be unavailable.—*Smith v. Bulkley et al.*, 227.

Same—Where a corporation was enjoined from bringing any action to prevent a foreclosure sale under a deed of trust to corporate property, the injunction was binding on the stockholders and prevented them from bringing any such action.—*Ib.*

Liability of Stockholders—Mining Claims—Failure to Discover Mineral—Exchange for Capital Stock—Where the locator of certain mining claims on which no discovery of mineral had been made transferred the claims to a corporation in exchange for the paid-up capital stock of the corporation, the locator having acquired no right to the claims could convey none to the corporation, and having transferred nothing of value to the corporation in exchange for the capital stock received by him, he was liable for the debts of the corporation to the amount of the value at which said claims were received by the corporation.—*Buck v. Jones*, 250.

Fraud—Transfer of Property to Corporation—Possession—Attachment—Innocent Purchaser—Preferred Creditor—Where a partnership which was indebted to a greater amount than the value of its assets organized a corporation to which the firm

CONVEYANCES—Continued.

transferred its assets, there being no apparent change in the conduct and management of the business, the same member of the old firm who had charge prior to transfer to the corporation having charge afterwards, the transfer was in fraud of creditors and the property transferred was subject to attachment as the property of the old partnership. And a creditor of the old firm who assisted in the organization of the corporation and purchased a half interest therein with full knowledge of the facts was not an innocent purchaser, neither was he entitled to protection as a preferred creditor.—*The Colorado Trading and Transfer Co. v. The Acres Commission Co.*, 253.

Powers of Agent—Bills and Notes—The general manager of a corporation organized for the purpose of dealing in and raising cattle and other stock and acquiring lands and other property necessary to its business, who had charge of the corporation's business with authority to represent the company in such transactions as are usually incident to such business, has no implied authority to execute in the name of the corporation a promissory note and bind the company thereby.—*The Sanford Cattle Co. v. Williams*, 378.

Same—Notice—The fact that the manager of a corporation who executed an unauthorized promissory note of the corporation was also a director would not charge the corporation with notice of the unauthorized act.—*Ib.*

Same—Authority of an agent to purchase property for a corporation and to contract an indebtedness against the corporation therefor would not include the power to execute and bind the corporation to pay a promissory note due in eighteen months with a higher rate of interest than the legal rate and ten per cent. attorney's fee if collected by an attorney.—*Ib.*

Action by Stockholders—Pleading—An action cannot be maintained by stockholders of a corporation upon a cause of action which was a direct wrong to the corporation itself, unless it affirmatively appears that plaintiffs have made proper effort to induce the directors of the corporation to bring suit in the name of the corporation and that the directors have failed or refused to do so, and also that plaintiffs have exhausted all means within their reach to obtain redress through the stockholders of the corporation, or unless a state of facts be shown which makes it apparent that such effort to induce action by the directors or to obtain relief through the stockholders would be futile.—*Ide et al. v. Bascomb et al.*, 415.

CONVEYANCES—Continued.

Evidence—In an action against a corporation for goods sold to another corporation the testimony of the seller that the corporation to whom the goods were sold was afterwards called by the name of the corporation sued is insufficient to sustain a judgment against the corporation sued, where defendant's evidence showed that the two corporations were separate and distinct and that defendant was not a successor of the corporation to whom the goods were sold.—*The Bullion Milling Co. v. The Gates Iron Works*, 472.

COSTS:

County Judges' Fees—Trials—Statutory Construction—Under the provisions of 3 Mills' Ann. Stats., section 1901, fixing a fee for county judges for each trial or hearing of a cause in the county court, to be taxed against the losing party, a county judge is not entitled to collect from the county a trial fee in a misdemeanor case disposed of by nolle prosequi.—*The Board of County Commissioners of Garfield County v. Beardsley*, 55.

County Judges' Fees—Claims Against County—A county judge is not entitled to collect from the county fees and expenses for attending district court to defend the jurisdiction of the county court in misdemeanor cases.—*Ib.*

COUNTERCLAIM:

Pleading—Practice—Dismissal—Where a complaint alleged two causes of action and defendant set up a counterclaim which was general and applied equally to both causes of action and could have been disposed of at the trial of the first cause, it was not error to permit plaintiff to dismiss the second cause.—*Collin v. The Farmers' Alliance Mutual Fire Insurance Co.*, 170.

COUNTY COMMISSIONERS:

Negligence—Duty to Examine Jail—Injury to Prisoner by Fire—Liability of Commissioners—Section 2523, Mills' Ann. Stats., requiring county commissioners to make personal examination of the county jail, its sufficiency and management at each session of the board and to correct all irregularities and improprieties therein found, imposes a public official duty and the commissioners are not individually liable thereunder to an action for damages for the death of a prisoner caused by the burning of the county jail, alleged to have been caused by their negligent failure to make such examination.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

COUNTY JUDGES:

Costs—Trials—Statutory Construction—Under the provisions of 3 Mills' Ann. Stats., section 1901, fixing a fee for county judges for each trial or hearing of a cause in the county court, to be taxed against the losing party, a county judge is not entitled to collect from the county a trial fee in a misdemeanor case disposed of by nolle prosequi.—The Board of County Commissioners of Garfield County v. Beardsley, 55.

Costs—Claims Against County—A county judge is not entitled to collect from the county fees and expenses for attending district court to defend the jurisdiction of the county court in misdemeanor cases.—Ib.

COUNTY WARRANTS:

Claims Against Counties—Disallowance in Part—Accepting Warrant—Notice—Appeal—Where a claim against a county was disallowed in part and a warrant was issued for the amount allowed as in full payment of the claim, and the claimant received the warrant without any knowledge that it was conditioned as in full of his claim, he was not precluded from a recovery of the balance of his claim against the county. The fact that he afterwards appealed from the action of the board disallowing part of his claim is not of itself sufficient to charge him with knowledge of the condition attached to his acceptance of the warrant.—The Board of County Commissioners of Garfield County v. Beardsley, 55.

DAMAGES:

Sales—Breach of Contract to Buy—Measure of Damage—Market Price—Cost of Production—Instructions—In an action for damages for breach of contract to purchase the output of a coal mine, if the output of the mine could have been sold in the market at a price above the cost of production, the measure of plaintiff's damage would be the difference between the price agreed to be paid by defendant and the market price. And in the absence of a showing that there was no market value, an instruction that the measure of damage was the difference between the contract price and the cost of producing the coal named in the contract was erroneous.—Kincaid et al. v Price et al., 73.

Mortgages—Wrongful Sale by Mortgagee—Measure of Damage—Conflicting Instructions—In an action for damage for a wrongful sale of land by defendant which plaintiff had mortgaged to defendant by a deed absolute in form and for refusing to per-

DAMAGES—Continued.

mit plaintiff to redeem, where the court in one section of its instructions told the jury that the measure of damage was the difference between the sum of the liens on the land and the amount for which it was sold by defendant, provided it was not sold for less than its market value, and in another section that the measure was the difference between the market value at the time of sale and the price for which it was sold by defendant, and in another section that plaintiff was entitled to recover the entire purchase price with interest, and it does not appear which rule the jury adopted, even if any one of the rules laid down for the measure of damage was correct, the instructions are so conflicting that a verdict and judgment based thereon should be reversed.—*Arnett v. Huggins*, 115.

Same—In an action for damage for a wrongful sale by defendant of land held by him under a deed from plaintiff absolute in form but in fact a mortgage, and for refusing to allow plaintiff to redeem, where the answer tendered other issues and there was evidence tending to support them, it was error to instruct the jury that the only question before it was the measure of damage.—*Ib.*

Negligence—Interest—Instructions—In an action for damages for personal injury where the prayer of the complaint asked for interest upon the damages to be assessed, it was not prejudicial error to refuse a requested instruction by defendant that no interest could be allowed where the instructions given upon the measure of damage confined the jury to an ascertainment of the actual damage sustained and left no room for an allowance of interest.—*Trumbull v. Donahue*, 460.

Negligence—Instructions—Measure of Damages—Harmless Error—In an action for damages for personal injuries alleged to have been caused by defendant's negligence where the verdict of the jury is for the defendant, errors committed in instructions upon the question of the measure of damage are not prejudicial and will not justify a reversal.—*Zimmerman et al. v. The Denver Consolidated Tramway Co.*, 480.

DECREES: See JUDGMENTS.

DEEDS: See CONVEYANCES.

DEEDS OF TRUST: See MORTGAGES.

DEFAULT:

Judgments—Motion to Set Aside—Meritorious Defense—Excusable Neglect—The mere fact that a defendant had a meri-

DEFAULT—Continued.

torious defense to an action is not sufficient to set aside a default and judgment against him but he must show that his neglect in permitting the judgment to be taken against him was excusable.—*Barra v. The People*, 16.

Same—Negotiations of Settlement—A motion to set aside a default and judgment which alleges that the neglect to plead was because of negotiations looking toward a settlement, but which fails to allege with whom the negotiations were held and in what they consisted, is insufficient to state a cause of excusable neglect.—*Ib.*

Same—Forfeited Recognizance—Search for Defendant—The fact that the surety upon a forfeited recognizance was at the time making search for his absconding principal with a view of procuring his presence in court does not excuse his neglect to plead to an action upon the forfeited recognizance and is not a sufficient showing to set aside a default judgment.—*Ib.*

Summons—Motion to Set Aside—Appearance—A motion to set aside a default judgment on account of excusable neglect was a general appearance and waived the right to question the sufficiency of the summons.—*Ib.*

DISTRICT ATTORNEYS:

Assistants—Power of Court to Appoint—Compensation—Claim Against County—The district court has inherent power, in the exercise of a proper discretion, to appoint counsel to assist the district attorney in the prosecution of criminal cases subject to review in the appellate courts for the abuse of such discretion, and such assistant is entitled to compensation for his services to be paid by the county charged with the payment of the expenses of such prosecution.—*The Board of County Commissioners of Hinsdale County v. Crump*, 59.

Same—Value of Services—Allowance by Court—Evidence—Where counsel was appointed by the district court to assist the district attorney in the prosecution of a criminal case, an allowance by the court of compensation to such counsel for his services is at least prima facie evidence of the value of the services.—*Ib.*

Same—Verification of Claim—Where counsel was appointed by order of the district court to assist the district attorney in the prosecution of a criminal case and an allowance made by the court for his services, in presenting the claim to the board of county commissioners for allowance, it is not necessary that it be verified by the affidavit of the claimant, but

DISTRICT ATTORNEYS—Continued.

the claim is sufficiently proven by a certified copy of the order making the appointment.—*Ib.*

Claim Against County—Assistant District Attorney—Pleading—Amendment—Departure—Where counsel was appointed to assist the district attorney to prosecute a criminal case and brought an action against the county to recover compensation for his services and alleged in his original complaint that he was appointed and acted as "special prosecutor" in the case mentioned, an amendment by interlineation by striking out the words "special prosecutor" wherever they occurred and inserting instead "to assist the district attorney" was not a departure from the original cause of action.—*Ib.*

Fees—Performance of Service—A district attorney is not entitled to demand and receive commission from a county upon a sum received by the county in settlement of a suit against the county treasurer and sureties upon his official bond to recover a shortage in the treasury fund, where the suit was brought by the county attorney and the only thing the district attorney did in connection with the suit was to request that his appearance be entered for the county which was done upon motion of the county attorney, the suit having been compromised and settled for a smaller sum than that claimed shortly after the entry of the appearance of the district attorney and dismissed by the county attorney, the district attorney taking no part in such settlement although the district attorney was ready and willing to perform any necessary service connected with said suit had he been requested to do so by the county attorney or commissioners.—*McMullin v. Montrose County*, 117.

DIVORCE AND ALIMONY:

Ne Exeat Bond—Action Upon Bond—Parties—Where in a suit for divorce and alimony by a wife against her husband a writ of ne exeat was issued against the defendant and he entered into bond, payable to the people, conditioned that he would not leave the jurisdiction of the court without leave of the court, an action upon the bond for breach of its condition was properly brought in the name of the people for the use and benefit of the wife.—*Marsellis v. The People for the Use of Isabella M. Butter*, 258.

Same—Pleading—In an action upon a ne exeat bond an objection to the complaint that it does not definitely appear whether the principal in the bond left the jurisdiction before or after judgment was recovered against him in the action in which

DEFAULT—Continued.

torious defense to an action is not sufficient to set aside a default and judgment against him but he must show that his neglect in permitting the judgment to be taken against him was excusable.—*Barra v. The People*, 16.

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DISTRICT ATTORNEYS—Continued.

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DIVORCE AND ALIMONY:

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Same—Pleading—In an action upon a ne exeat bond an objection to the complaint that it does not definitely appear whether the principal in the bond left the jurisdiction before or after judgment was recovered against him in the action in which

DIVORCE AND ALIMONY—Continued.

the writ of ne exeat was issued should be raised by motion and not by demurrer.—Ib.

Ne Exeat Bond—Action Upon—Breach of Condition—In an action upon a ne exeat bond for breach of the condition that the principal obligor, who was defendant in a suit for divorce and alimony, would not leave the jurisdiction of the court without leave of the court, it is immaterial whether he left before or after judgment was rendered against him in the divorce suit, if he left without leave of court.—Ib.

EASEMENTS:

Contracts—Parol—Water Rights—A parol contract whereby plaintiff was to construct a ditch through the land of defendant and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch.—Croke v. The American National Bank, 3.

Same—Notice—Where one has an easement in a ditch through the lands of another based on an oral contract and had been in open visible use of the ditch for irrigation purposes for several years up to the time the land was sold without any exception of the easement, the purchaser took the land charged with notice of the easement and subject thereto.—Ib.

Conveyances—Evidence—Estoppel—Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.—Ib.

Water Rights—Equity Jurisdiction—An action to protect an easement in a ditch used for irrigation is peculiarly within the jurisdiction of equity.—Ib.

Conveyances—Water Rights—An easement such as the right to use an irrigating ditch to carry water for the purpose of irrigating land will pass as an appurtenance to the land without specific mention in the deed if such was the intention of the grantor; and the deed being silent, such intention may be

EASEMENTS—Continued.

gathered from the presumptions arising from the circumstances surrounding the transaction.—*The American National Bank v. Hoeffler*, 53.

Same—A. owned two separate tracts of land and constructed a ditch across one tract to carry water for the purpose of irrigating the other. A. conveyed both tracts to S., but by separate deeds and at different times and without specific mention of the ditch. S. conveyed the tract irrigated by the ditch to H., and several years later conveyed the land across which the ditch was constructed to plaintiff, and H. conveyed with all appurtenances the tract so irrigated to defendant. None of the deeds specifically mentioned the ditch. During the ownership of A., S. and H., the ditch was continuously, openly and visibly used to irrigate the land passed to defendant. Held, that the circumstances surrounding the conveyances raised a reasonable presumption that it was the intention of each of the grantors to convey the easement in the ditch, and under such presumption defendant was the owner of such easement, and that it was error to enjoin defendant from using the same.—*Ib.*

ELECTIONS:

Cities and Towns — Office of Mayor — Filling Vacancy — Mandamus—Under section 4488, Mills' Ann. Stats., providing that in case a vacancy occurs in the office of mayor of a city, the city council shall order a special election as soon as practicable to fill the vacancy, it is the duty of the city council to order such special election at its first regular session after a vacancy occurs, and in case of a failure or refusal to do so, mandamus will lie to compel them to order such election.—*Rizer et al. v. The People*, 40.

Same—Election Expenses—Where a vacancy occurs in the office of mayor of a city, the fact that the last annual appropriation for election expenses was exhausted by the general election which followed it is no valid reason for the city council refusing to order a special election to fill the vacancy.—*Ib.*

Same—Demand—Where a city council failed to order a special election to fill a vacancy in the office of mayor as required by statute, no formal demand on the council to order such election was necessary before commencing an action of mandamus to compel them to do so.—*Ib.*

Same—Relators—Where a city council fails to order a special election to fill a vacancy in the office of mayor as required by

ELECTIONS—Continued.

statute, mandamus may be instituted to compel them to do so upon the relation of private citizens.—*Ib.*

Cities and Towns—Trustees—Mayor pro Tem.—Right to Vote—A member of the board of trustees of an incorporated town, while presiding over the sessions of the board as mayor pro tem., is entitled to vote upon all questions whether or not there is a tie, and the appointment of a town marshal by the board of trustees was legal although it required the vote of the mayor pro tem. to constitute the necessary number to elect.—*Harris v. The People*, 160.

State Board of Canvassers—Jurisdiction—Mandamus—The duties of the state board of canvassers in canvassing the returns of an election for representative in the general assembly are purely political and governmental, and the courts have no jurisdiction to control its action therein by mandamus.—*Orman et al. v. The People ex rel. Cooper*, 302.

Same—Discretion—Even if the courts had jurisdiction to mandamus the state board of canvassers, the writ would lie only to command the board to act, and not to control their discretion by commanding them how to act in a case where there were presented to them what purported to be two sets of abstracts of votes each claiming to be the correct one.—*Ib.*

ELECTRICITY:

Negligence—Defective Wiring—County Jail—Injury to Prisoner by Fire—Pleading—Where a prisoner in a county jail was suffocated and killed by the burning of the jail, in an action against an electric light company a complaint which alleged that the company placed wires in the building and transmitted a current of electricity over them for the purpose of lighting the building, that the wires were negligently and unskillfully placed, reciting the facts upon which said charge of negligence was based, and that by reason of said negligence the building was set on fire and burned, causing the death of plaintiff's decedent, stated a cause of action against said company.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

EMPLOYER AND EMPLOYEE:

Contracts—Wages—Receipts—Plaintiff had been in defendant's employ as car repairer at fifty dollars per month. He testified that defendant agreed to raise his wages five dollars per month. His pay checks were continued to be made out for fifty dollars. The first one received after the claimed raise of wages he objected to, but his objection was not made to the

EMPLOYER AND EMPLOYEE—Continued.

person authorized to employ men for defendant. He continued in defendant's employ for fourteen months and each month his pay check was made out for fifty dollars, which he accepted and receipted as in full settlement of the month's wages. The person who employed plaintiff testified that his agreement to raise plaintiff's wages was conditioned upon his performance of the work of carpenter and car inspector which he never performed. Held, that plaintiff was not entitled to recover the balance of the wages claimed.—*The Chicago, Rock Island & Pacific Railway Co. v. Mills*, 8.

Contracts—Evidence—Joint Liability—Request for Services—In an action against three defendants for services alleged to have been performed at defendants' request where the evidence fails to show that one of the defendants, either individually or jointly with his codefendants, made any request of plaintiff to perform the services in question, a judgment against all three defendants is erroneous and must be reversed.—*Johnson et al. v. Lawson*, 297.

Same—Estoppel—In an action against three defendants for services performed where one of the defendants did not employ plaintiff nor authorize his employment and had no interest in the work performed by him, in order to sustain a judgment against such defendant on the ground that he led plaintiff to believe that he was one of the parties employing him, and plaintiff having relied thereon, said defendant was estopped to deny that he was one of said parties, the evidence of the representations of such defendant upon which plaintiff acted must be plain and certain.—*Ib.*

EQUITY PROCEEDINGS:

Water Rights—Easements—An action to protect an easement in a ditch used for irrigation is peculiarly within the jurisdiction of equity.—*Croke v. The American National Bank*, 3.

Tax Sales — Redemption — Mandamus — Parties—Where land covered by a deed of trust was sold for taxes part of which were assessed against the land and part of which were assessed as personal tax of the owner, in a proper proceeding the beneficiary of the trust deed is entitled to a release as to his interest in the land from the tax sale by payment only of the amount properly chargeable against the land, but mandamus will not lie against the county treasurer to compel him to release said land from the tax sale except upon payment of the entire

EQUITY PROCEEDING—Continued.

amount for which it was sold with interest and penalties. The proper remedy would be a proceeding in equity against the holder of the certificate of purchase.—*Statton v. The People*, 85.

Banks—Liability of Stockholders—The only proceeding through which complete relief can be administered under the statute making the stockholders of an insolvent banking corporation liable for its debts, is an equitable one brought by one creditor in behalf of all others similarly situated, against all the stockholders.—*Richardson v. Boot*, 140.

County Courts—Jurisdiction—County courts have jurisdiction of suits in equity where the value of the property in controversy does not exceed two thousand dollars.—*Arnett v. Berg et al.*, 341.

Juries—Equitable Action—Suit to Cancel Deed—An action to cancel a deed on the ground of fraud in its procurement is an equitable action and it is discretionary with the court whether or not issues of fact shall be submitted to a jury, and a denial of a demand for a jury trial is not error.—*Kyle v. Shore et al.*, 355.

ESTATES OF DECEDENTS:

Administrators—Continuing Business of Deceased—The general rule is that an executor or administrator is not permitted to engage in trade with the assets of the estate, nor to carry on the business of the decedent unless expressly so directed by the will, or authorized by the court which has charge of the administration of the estate. If he does, he must himself personally bear all expenses incurred and losses sustained, and account for all profits. But there are exceptions to the rule, as for instance, where it is necessary in a mercantile business or manufactory, temporarily to continue the business, not for the purpose, primarily, of making profit out of the business, but in order to dispose of and realize upon the assets of the estate to the best advantage. In such case the purchase of some goods may be necessary to aid in the sale of decedent's stock on hand, and the purchase will be treated as a necessary and allowable expense of settlement of the estate.—*Fleming v. Kelly, Maus & Co.*, 23.

Same—Presumptions—Where an administrator under an order of court continued for three years a manufacturing business of the deceased, in the absence of a showing to the contrary, it will be presumed that the court acted wisely in making the

ESTATES OF DECEDENTS—Continued.

order, and that it was necessary to continue the business for three years in order to wind it up to the best advantage of the estate.—Ib.

Same—Claims for Goods Purchased—Where an administrator under an order of the court continued the manufacturing business of his deceased for three years at a profit to the estate, and during the time purchased some goods which were necessary to the business, and the creditor who sold the goods to the administrator presented his bill as a claim against the estate after the administrator who contracted the debt had resigned and his successor had been appointed, the claim was properly allowed as a second-class claim against the estate.—Ib.

Loan of Funds—Fraudulent Conveyance—Consideration—Attachment—Where the sole legatees of an estate consisting of personal property against which there were no debts, the legatees being of age, before any distribution was made, authorized the executor to loan the funds belonging to the estate to a partnership composed of the executor and another party, the loan created a debt from the partnership to the legatees, that was a sufficient consideration to sustain a transfer of the property of the partnership to said legatees as against the attaching creditors of the partnership.—*The Denver Jobbers' Association v. Rumsey et al.*, 320.

Evidence—Discrediting Witness—Record—Parties—The record of a proceeding to remove an administrator finding that through the negligence of the administrator and the fraud of his agent the estate had been defrauded, to which proceeding the agent was not a party, is not admissible in evidence in another cause in which said agent is a witness for the purpose of discrediting his testimony.—*Tourtelotte v. Brown*, 335.

Same—In an action against an administrator a conversation between the administrator and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent is not prohibited from admission in evidence by section 4816, Mills' Ann. Stats.—Ib.

Bills and Notes—Forgery—Evidence—Evidence held sufficient to sustain a verdict finding that the signature of a deceased person to a note was a forgery.—Ib.

Executors—Power to Sell Land—Employment of Agent—Commission—Where a will empowers an executor to sell land the executor has power to employ an agent to aid him in effecting such sale and to contract to pay the agent commission, and an

ESTATES OF DECEDENTS—Continued.

agent so employed who effects a sale may maintain an action against the executor as such for his commission. The amount of commission that an executor may contract to pay an agent is not limited by section 4805, Mills' Ann. Stats., prescribing the compensation of executors for selling land.—*Ingham v. Ryan*, 347.

ESTOPPEL:

Conveyances—Easements—Evidence—Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.—*Croke v. The American National Bank*, 3.

Bills and Notes—Accommodation Paper—National Banks—Receivers—Where a national bank had in violation of the national banking act loaned to one person more than one-tenth of its paid-in capital stock and a person executed his notes, one payable directly to the bank and others to payees who indorsed them and delivered them to the bank, which were credited upon the unauthorized loan thus reducing the loan to an amount within the statute, the maker is liable on such notes in the hands of a receiver of the bank, notwithstanding they were executed purely as a matter of accommodation to the borrower and notwithstanding said borrower may have owned nearly all the capital stock of said bank and had complete control thereof. Even though the bank knew the notes were accommodation paper and accepted them under conditions that would have precluded its recovery thereon, the notes having been executed for the purpose of giving the bank the appearance of holding genuine and valid assets, the maker is estopped to say as against the creditors of the bank that they were other than what they appeared on their face to be.—*Murphy v. Gumaer*, 183.

Life Insurance—Fraud—Action for Premium—Counterclaim—Plaintiffs as insurance agents contracted with defendant to furnish defendant a certain specified kind of policy of insurance and for the first year's premium defendant executed two promissory notes due at different times. When the policy was de-

ESTOPPEL—Continued.

livered, one of the plaintiffs pretended to read to defendant a part of it which indicated that it was in accordance with the agreement, and told defendant that such was the case. Relying upon plaintiff's representations, defendant paid the first note and laid the policy away without reading. In an action by plaintiffs on the second note nine months after the delivery of the policy, defendant pleaded fraud practiced upon him in delivering to him a different policy than that represented and set up a counterclaim for the sum paid on the first note. Held, that plaintiffs were not entitled to set up in defense of their own wrong that defendant was estopped to object to the policy because of his negligence in not objecting thereto for an unreasonable length of time, and it was error to dismiss defendant's counterclaim on that ground.—*Lemond v. Harrison et al.*, 246.

Cities and Towns—Sewer Taxes—Failure to Record Tax Sales—Where a special sewer tax was assessed against a city lot but no record thereof was made either in the office of the county treasurer or county clerk, and twelve years after such assessment was made the city attempted to enforce its lien by causing said lot to be sold for said tax, the city was estopped to assert its tax lien as against a purchaser of the lot who purchased without notice of such tax and after an examination of the records for tax liens, and who received no notice of the tax or the tax sale until the purchaser at the tax sale applied for a deed upon his tax-sale certificate. The holder of the tax-sale certificate was not entitled to a deed and the tax lien and certificate should be annulled.—*Elder et al. v. Fox et al.*, 263.

Contracts—Evidence—Joint Liability—Request for Services—In an action against three defendants for services performed where one of the defendants did not employ plaintiff nor authorize his employment and had no interest in the work performed by him, in order to sustain a judgment against such defendant on the ground that he led plaintiff to believe that he was one of the parties employing him and plaintiff having relied thereon said defendant was estopped to deny that he was one of said parties, the evidence of the representations of such defendant upon which plaintiff acted must be plain and certain.—*Johnson et al. v. Lawson*, 297.

Pleading—Replevin—In an action of replevin by the owner to recover property levied on and held under executions against other parties a defense that plaintiff is estopped to assert ownership of the property as against the execution creditors because

ESTOPPEL—Continued.

the execution defendants were permitted to hold themselves out as owners so as to justify said creditors in believing that they were the owners, cannot be relied on unless it is pleaded.—*A. Leschen & Sons Rope Co. v. Craig et al.*, 353.

EVIDENCE:

Conveyances—Easements—Estoppel—Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.—*Croke v. The American National Bank*, 3.

Receipts—Unliquidated Claims—The rule that a receipt is only prima facie evidence of payment is applicable only to cases where the money is due and the amount is undisputed. If there is no disagreement as to amount a receipt for a less amount, in full of the demand, is without consideration and does not bind the creditor, but if the claim is unliquidated or the amount is in dispute a receipt in full is conclusive against the party giving it. Nor is the settlement affected by the fact that the creditor receives only what the debtor concedes to be due, nor that he takes the money under protest still asserting his claim to the balance.—*The Chicago, Rock Island & Pacific Railway Co. v. Mills*, 8.

Employer and Employee—Contracts—Wages—Receipts—Plaintiff had been in defendant's employ as car repairer at fifty dollars per month. He testified that defendant agreed to raise his wages five dollars per month. His pay checks were continued to be made out for fifty dollars. The first one received after the claimed raise of wages he objected to, but his objection was not made to the person authorized to employ men for defendant. He continued in defendant's employ for fourteen months and each month his pay check was made out for fifty dollars, which he accepted and receipted as in full settlement of the month's wages. The person who employed plaintiff testified that his agreement to raise plaintiff's wages was conditioned upon his performance of the work of carpenter and car

EVIDENCE—Continued.

inspector, which he never performed. Held, that plaintiff was not entitled to recover the balance of the wages claimed.—Ib.

Memorandum Book—Inspection—Where a witness in testifying referred to a small memorandum book and on cross-examination counsel asked the witness to let him see the book, which the witness refused, it was not error to refuse to strike out all the witness' testimony in reference to matters stated to be in the book. The book not being a regular account book but containing private memoranda of other matters as well as of the matter in controversy, counsel had no right to inspect the book, but only the memoranda from which he testified, and this only upon proper application made to the court.—Parks et al. v. Biebel, 12.

Statement of Account—In an action for labor performed upon a road and for hauling, it was not prejudicial error to admit in evidence on behalf of plaintiff a written statement of account testified to as having been made from the original book of accounts which had been subsequently lost and where all the items on the statement were testified to by the witness, and there was no substantial dispute about any items of the account, but the controversy was as to whether plaintiff had complied with his hauling contract and as to whether defendant's obligation for work on the road was limited to the amount allowed by the county.—Ib.

Appellate Practice—Abstract of Record—An assignment of error based on the ruling of the court sustaining an objection to the introduction in evidence of an exhibit will not be considered unless such exhibit is contained in the abstract of record.—Lowenstein v. Alexander, 22.

Same—An assignment of error based on a ruling of the court sustaining an objection to a question propounded to a witness will not be considered unless the question is contained in the abstract of record.—Ib.

Life Insurance—Cause of Death—Proofs—In an action upon a policy of life insurance plaintiff was not concluded by the statement of the physician in the proof of death furnished to the company as to the cause of the death of insured, but could contradict such statement by other evidence where defendant was notified by the pleading that plaintiff would dispute such statement.—The Denver Life Insurance Co. v. Price, 30.

Wills—Contests—In a trial in the district court on appeal from an order of the county court probating a will the contestant is not limited to the testimony of the subscribing witnesses of the

EVIDENCE—Continued.

will, but is entitled to introduce any competent testimony as to the mental capacity of the testator.—*Ashworth v. McNamee et al.*, 85.

Appellate Practice—Findings—Conflicting Evidence—Promise to Pay Debt of Another—The finding of the trial court as to whether or not a party promised to pay the debts of others made upon conflicting testimony is conclusive upon the appellate court.—*The Newlon-Hart Grocer Co. v. Peet*, 147.

Attachment—Non-Resident—Change of Residence—A finding of the trial court that a defendant in an attachment suit was a resident of the state so as to defeat an attachment based on the ground of non-residence is supported by evidence which shows that defendant had been a resident of the state for a number of years, that he had gone out of the state and was absent from the state when the attachment was sued out, and where defendant and his wife testified that he had only temporarily left the state to accept a three months' job of work, leaving his household goods in the state.—*Ib.*

Sales—Personal Property—Possession—Evidence examined and held not sufficient to constitute such change of possession as will sustain a sale of personal property as against creditors of the vendor.—*Willis v. Roberts*, 149.

Appellate Practice—Verdict—Where plaintiff and defendant were the only witnesses and plaintiff's testimony established his case but was flatly contradicted by defendant, a verdict for plaintiff will not be disturbed on appeal.—*Rickey v. Brady*, 158.

Bills and Notes—Pleading—Misnomer—Variance—Where a complaint on a promissory note set out a copy of the note in which the payor's name was spelled "Colin," whereas the name on the note was "Collin," the difference in the spelling was not a material variance and the note was properly admitted in evidence.—*Collin v. The Farmers' Alliance Mutual Fire Insurance Co.*, 170.

Motion to Strike Out—Exception—Objection—An exception to a ruling sustaining a motion to strike out certain evidence is unavailing without previous objection to the motion.—*Ib.*

Withdrawal—Objections—Where plaintiff introduced a witness and asked one question and when defendant commenced to cross-examine him, plaintiff by permission of the court withdrew the evidence to which defendant objected but stated no reason for the objection, the objection was insufficient to sustain an exception to the withdrawal.—*Ib.*

EVIDENCE—Continued.

Principal and Agent—Agency may be established by evidence of facts and circumstances from which the existence of the agency may be conclusively presumed.—*Cheesman v. Nicholl*, 174.

Conveyances—Consideration—Parol Agreement—Instructions—In an action by a grantor against a grantee to collect an additional consideration over and above that recited in the deed upon an oral promise of the grantee, an instruction which told the jury that the written instruments were presumed to contain all the agreements of the parties and that the burden was upon the plaintiff to establish the oral agreement by a preponderance of evidence and that the evidence must be so clear as to satisfy the jury that such agreement was made, was sufficient. It was not the duty of the court to require the jury to find the establishment of the parol agreement beyond a reasonable doubt.—*Ib.*

Principal and Agent—Commission—Sale of Real Estate—In an action by real estate agents for commission where the cause of action was based upon the ground that plaintiffs procured a customer and that through their efforts a sale was effected, evidence that prior to the date of giving the agency to plaintiffs by defendant, other agents had introduced to defendant the party who subsequently became the purchaser through them, and that the negotiations with said purchaser through said other agents had never been broken off, was admissible in defense to show that the sale was not effected through plaintiffs' efforts, and its exclusion was error.—*Smiley v. Bradley et al.*, 191.

Same—Instructions—In an action by real estate agents for commission under a specific contract of agency in writing, where plaintiffs based their cause of action on the ground that a sale had been effected through their efforts, and where there was evidence tending to show that negotiations were pending between defendant and the purchaser through other agents prior to the time defendant gave to plaintiffs the agency, and that said negotiations subsequently resulted in a sale, it was error to instruct the jury not to consider any proposition of sale or trade between any parties and defendant prior to the agency contract between defendant and plaintiffs.—*Ib.*

Sales—Fraudulent Representations—Admissions—In an action by a purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and was purchased through the false and fraudulent

EVIDENCE—Continued.

representations of defendant, defendant's admissions were competent evidence against him.—*Geraghty v. Randall*, 195.

Sales—Fraudulent Representations—Principal and Agent—Reliance of Agent—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and that the sale was made through defendant's false and fraudulent representations, where plaintiff had no personal knowledge of the transaction but made the purchase entirely through an agent, it was sufficient to show the agent's reliance upon the representations and was not necessary to show plaintiff's reliance thereon.—*Ib.*

Contracts—Written and Parol—Variance—A written contract whereby plaintiff agreed to establish a store and boarding house at defendant's mining camp and to furnish supplies and board to defendant's employees, and in which defendant agreed to aid plaintiff in collecting board and store accounts from its employees, without specifying how such aid was to be rendered, was not varied by a subsequent oral contract wherein defendant agreed to pay the board and store accounts of its employees to plaintiff and deduct the same from their wages, and in an action by plaintiff against defendant to recover such accounts the verbal contract was admissible in evidence.—*The Cerrusite Mining Co. v. Steele*, 216.

Former Trial—Stenographer's Notes—The notes of the official stenographer of the county court, of the evidence of a witness, are not admissible in the trial of the same cause in the district court to prove the testimony of such witness in the absence of a stipulation to that effect.—*Ib.*

Appellate Practice—Findings—Conflicting Evidence—A finding of the trial court upon conflicting testimony which is not manifestly against the weight of the evidence and where there is sufficient evidence to support it, is conclusive on the appellate court.—*The Johnson-Woodbury Hat Co. v. Lightbody*, 239.

Contracts—Employment by Year—Custom—In an action by a traveling salesman against a wholesale merchant for balance of his salary under a contract of employment "for a period of one year for the season commencing December 1st," where defendant contended that plaintiff had not worked out the entire year, evidence of the known custom of trade in that line of business was admissible to show what constituted the season for traveling salesmen and when such season ended.—*Ib.*

EVIDENCE—Continued.

Chattel Mortgages—Contract to Pay Debts of Mortgagor—Where a merchant executed a chattel mortgage upon certain property in consideration of which the mortgagee assumed and promised to pay certain debts owed by mortgagor, the names of the creditors and the amounts owed to each, which the mortgagee assumed, being stated in the chattel mortgage, in an action by one of the creditors against the mortgagee for the amount stipulated and agreed to be paid to him, when plaintiff proved the contract in the chattel mortgage it was unnecessary to introduce further evidence to show that the mortgagor was indebted to plaintiff and the amount thereof, and error committed in the admission of secondary evidence as to the amount of such indebtedness was not prejudicial.—*Taylor v. Ingersoll*, 272.

Contracts — Joint Liability — Request for Services —In an action against three defendants for services alleged to have been performed at defendants' request, where the evidence fails to show that one of the defendants, either individually or jointly with his codefendants, made any request of plaintiff to perform the services in question, a judgment against all three defendants is erroneous and must be reversed.—*Johnson et al. v. Lawson*, 297.

Same—Estoppel—In an action against three defendants for services performed where one of the defendants did not employ plaintiff nor authorize his employment and had no interest in the work performed by him, in order to sustain a judgment against such defendant on the ground that he led plaintiff to believe that he was one of the parties employing him and plaintiff having relied thereon said defendant was estopped to deny that he was one of said parties, the evidence of the representations of such defendant upon which plaintiff acted must be plain and certain.—*Ib.*

Attachment — Fraud — Instructions —In an attachment suit where there is no evidence that the defendants fraudulently contracted any part of the indebtedness involved in the suit, the court should not submit such question to the jury.—*The Denver Jobbers' Association v. Rumsey et al.*, 320.

Sales—Evidence examined and held sufficient to establish a sale of smutty wheat and the purchaser's liability for the agreed price.—*Butterfield v. Butterfield*, 323.

Incompetent—Insufficient Objection—An objection to the cross-examination of a witness as to the contents of a letter on the ground that the witness should be permitted to see the letter

EVIDENCE—Continued.

and refresh her memory as to what she said, was insufficient to present the objection that the letter itself was the best evidence and that secondary evidence of its contents was incompetent.—*Rice et al. v. Williams et al.*, 330.

Incompetent—Appellate Practice—Harmless Error—The admission of incompetent evidence over objection is not reversible error if the evidence is not prejudicial to the interests of the complaining party.—*Ib.*

Motion to Compel Opponent to Introduce Letters—A party cannot by motion compel his opponent to introduce letters in evidence, but should offer them in evidence himself.—*Ib.*

Appellate Practice—Assignments of Error—An assignment of error based on the admission or rejection of evidence which refers to the testimony of a number of unnamed witnesses and directs the attention of the court to the testimony of no particular one, will not be considered.—*Tourtelotte v. Brown*, 335.

Discrediting Witness—Record—Parties—The record of a proceeding to remove an administrator finding that through the negligence of the administrator and the fraud of his agent the estate had been defrauded, to which proceeding the agent was not a party, is not admissible in evidence in another cause in which said agent is a witness for the purpose of discrediting his testimony.—*Ib.*

Conversation with Party Since Deceased—The admission in evidence of a conversation with a party since deceased is not reversible error where the conversation did not affect the issue on trial.—*Ib.*

Same—Estates of Decedents—In an action against an administrator a conversation between the administrator and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent, is not prohibited from admission in evidence by section 4816, *Mills' Ann. Stats.*—*Ib.*

Bills and Notes—Forgery—Evidence held sufficient to sustain a verdict finding that the signature of a deceased person to a note was a forgery.—*Ib.*

Replevin—Ownership—Evidence examined and held sufficient to establish ownership and right of possession in plaintiff in a replevin suit for property levied on and held by defendants under executions against other parties.—*A. Leschen & Sons Rope Co. v. Craig et al.*, 353.

EVIDENCE—Continued.

Accident Insurance—Statements of Deceased—Res Gestae—In an action upon an accident insurance policy where death is alleged to have been caused by accident, an injured condition being shown by other evidence, the cause of the injury can be shown by the statements of the deceased injured party, provided such statements constitute part of the *res gestae*.—*The Union Casualty and Surety Co. v. Mondy et al.*, 395.

Same—In an action upon an accident insurance policy where the evidence showed that deceased was a porter on a sleeping car, that the train came to a sudden and violent stop and immediately thereafter deceased was seen standing at a berth partially made down, his head between his hands, complaining of great pain; that he was put to bed and remained there until he arrived home three days thereafter, where he went to bed and was under the care of a physician until his death about twelve days thereafter; that an autopsy disclosed a congested condition of the brain from which he died; that he was a strong healthy man with no symptoms of disease from which the congestion could arise—the statement of the deceased made at the time he was discovered standing at the berth with his head between his hands, to the effect that the berth had fallen and struck him on the head, was admissible in evidence to show the cause of the injury.—*Ib.*

Appellate Practice—Findings of Trial Court—Written Evidence—The rule that the appellate court is concluded by the finding of the trial court on conflicting evidence does not apply where the evidence is in writing.—*The Colo. Dry Goods Co. v. W. P. Dunn Co.*, 409.

Sales—Warranties—Burden of Proof—In an action for the price of goods purchased by a written contract or order where defendant answered that the goods were purchased upon certain representations and warranties which were not true, and the written evidence of the contract discloses no such representations or warranties, the burden is upon the defendant to prove them.—*Ib.*

Deeds of Trust—Foreclosure—Recitals in Trustee's Deed—Prima Facie Evidence—Where a deed of trust provided that in case of foreclosure by the trustee the recitals in the trustee's deed should be prima facie evidence of the facts therein stated, a trustee's deed thereunder reciting that application for foreclosure had been made by the legal holder of the note was prima facie evidence that such application had been made, and

EVIDENCE—Continued.

in an action by the holder of the note to set aside the trustee's deed on the ground that no application was made for the foreclosure, it was error to refuse to allow defendant to introduce said trustee's deed in evidence until he had shown by other evidence the authority of the trustee to act.—*The Mosca Milling and Elevator Co. v. Murto*, 437.

Deeds of Trust—Foreclosure—Application of Purchase Money—Where a deed of trust provided that in case of foreclosure the purchaser should not be required to see to the application of the purchase money, payment to the trustee by the purchaser at a foreclosure sale was sufficient and he was not required to prove that the money was paid to the holder of the note to establish the validity of the trustee's deed.—*Ib.*

Bills and Notes—Endorsements—Book Entries—In an action upon a promissory note the book of original entries of a bank is admissible in evidence to corroborate endorsements of payments made upon the note.—*Coulter et al v. The Bank of Clear Creek County*, 444.

Agency—Declarations of Agent—Neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent.—*Burson v. Bogart*, 449.

Agency—Evidence examined and held not sufficient to establish agency so as to make defendant, the alleged principal, liable for goods purchased from plaintiff by the alleged agent.—*Ib.*

Practice—Discretion of Court—The form of questions and method of examination of witnesses are largely within the discretion of the trial court, and unless there is an arbitrary abuse of such discretion, the trial court's action in such matters will not be held to be reversible error.—*Ib.*

Negligence—Railroads—Crowded Condition of Car—Pleading—In an action against a railroad company for injuries to a passenger caused by the door of the car shutting and mashing plaintiff's finger while he was riding upon the platform, an allegation that the car was crowded so that there was no room for plaintiff on the inside was proper as explanatory of why plaintiff was riding upon the platform and for the purpose of removing the presumption of contributory negligence, and evidence was admissible in support of such allegation. And an allegation and proof in support thereof of the crowded condition of the platform was proper as explanatory of why plaintiff was riding in the position he was with reference to the door.—*Trumbull v. Donahue*, 460.

EVIDENCE—Continued.

Negligence—Railroads—Injury to Passenger—In an action against a railroad company for injuries to a passenger caused by a brakeman shutting the door of the car upon plaintiff's finger, the testimony of other passengers who were at the time riding with plaintiff upon the platform that they saw the position of plaintiff's hand at the time was admissible in corroboration of plaintiff's testimony as to his position on the platform.—*Ib.*

Same—Admissions—In an action against a railroad company for injuries caused by a brakeman shutting the door of the car upon plaintiff's finger, upon the issue as to whether or not the brakeman actually knew of the dangerous position of plaintiff's hand, statements and admissions of the brakeman made immediately after the mashing of plaintiff's finger were admissible as part of the *res gestae* to contradict the brakeman's testimony that he did not observe plaintiff's position at the time.—*Ib.*

Corporations—In an action against a corporation for goods sold to another corporation the testimony of the seller that the corporation to whom the goods were sold was afterwards called by the name of the corporation sued is insufficient to sustain a judgment against the corporation sued, where defendant's evidence showed that the two corporations were separate and distinct and that defendant was not a successor of the corporation to whom the goods were sold.—*The Bullion Milling Co. v. The Gates Iron Works*, 472.

Negligence—Street Railways—Appliance—In an action against a street railway company for running its car over and causing the death of a child, where there was nothing in the testimony tending to prove that the car was not properly equipped, nor that other appliances than those in use were better or safer, nor that any law or ordinance required the use of a fender at the time of the accident, it was not error to refuse to allow a witness to answer the question: "There was no fender like they have now?"—*Zimmerman et al. v. The Denver Consolidated Tramway Co.*, 480.

Negligence—Instructions—In an action against a street railway company for running its car over and killing a child, the court properly refused to submit to the jury the question of defendant's negligence in failing to provide the car with suitable contrivances for avoiding accidents of the kind, where

EVIDENCE—Continued.

there was no evidence upon which to predicate such instructions.—*Ib.*

Partnership—Accounting—New Trial—New Evidence—In an action by one partner against another for an accounting, a new trial will not be granted on the ground of newly discovered evidence where the fact for which the new trial is asked is that the partner in whose favor judgment was rendered has since the trial sold certain of the partnership property.—*Johnson v. Johnson*, 493.

Partnership—Accounting—Harmless Error—In an action for an accounting between two partners where a vast number of exhibits were introduced before the referee by both parties, the judgment of the court will not be reversed for refusing to strike out certain exhibits, even though they were incompetent, where the findings of the referee were warranted by other documentary and oral testimony introduced at the hearing.—*Ib.*

Appellate Practice—Referees—Findings—The findings of a referee upon conflicting evidence are entitled to the same consideration in the appellate court as the verdict of a jury or findings of the trial court.—*Ib.*

Appellate Practice—Exception to Judgment—Where the trial was before the court, an assignment of error that the judgment is against the weight of evidence will not be considered unless an exception to the judgment is made part of the record by bill of exceptions. An entry following the findings of the court, and judgment stating that an exception was taken, constitutes no part of the record.—*Rudolph v. Smith*, 496.

Appellate Practice—Assignment of Errors—An assignment of error based on the improper admission or exclusion of evidence will not be considered where the assignment fails to point out any particular evidence improperly admitted or excluded.—*Ib.*

EXECUTORS: See ESTATES OF DECEDENTS.

FALSE REPRESENTATIONS:

Sales—Evidence—Admissions—In an action by a purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and was purchased through the false and fraudulent representations of defendant, defendant's admissions were competent evidence against him.—*Geraghty v. Randall*, 195.

Sales—Principal and Agent—Reliance of Agent—In an action by the purchaser of mining stock against the seller to recover

FALSE REPRESENTATIONS—Continued.

back the purchase price on the ground that the stock was worthless and that the sale was made through defendant's false and fraudulent representations, where plaintiff had no personal knowledge of the transaction but made the purchase entirely through an agent, it was sufficient to show the agent's reliance upon the representations and was not necessary to show plaintiff's reliance thereon.—Ib.

Sales—Fraud—Juries—Verdict—Special Finding—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the sale was effected through the false and fraudulent representations of defendant the jury returned a general verdict for plaintiff, and in answer to a special interrogatory found that defendant was guilty of fraud and wilful deceit. The court sustained the general verdict but set aside the special finding on the ground that it was not sustained by the evidence. Held, that the action of the court was not inconsistent and that its action in setting aside the special finding will not be construed as a ruling that there was no evidence of fraud upon which to base the general verdict, but that there was not sufficient evidence of fraud and wilful deceit to warrant a verdict the effect of which was to authorize execution against the body of defendant.—Ib.

Life Insurance—Fraud—Action for Premium—Counterclaim—Estoppel—Plaintiffs as insurance agents contracted with defendant to furnish defendant a certain specified kind of policy of insurance and for the first year's premium defendant executed two promissory notes due at different times. When the policy was delivered one of the plaintiffs pretended to read to defendant a part of it which indicated that it was in accordance with the agreement and told defendant that such was the case. Relying upon plaintiff's representations defendant paid the first note and laid the policy away without reading. In an action by plaintiffs on the second note nine months after the delivery of the policy, defendant pleaded fraud practiced upon him in delivering to him a different policy than that represented and set up a counterclaim for the sum paid on the first note. Held, that plaintiffs were not entitled to set up in defense of their own wrong that defendant was estopped to object to the policy because of his negligence in not objecting thereto for an unreasonable length of time, and it was error to dismiss defendant's counterclaim on that ground.—*Lemond v. Harrison et al.*, 246.

FALSE REPRESENTATIONS—Continued.

Sales—Transfer to Innocent Purchaser—Replevin—Where a party obtained possession of a typewriter by false and fraudulent representations that he was agent for another party for whom he was making the purchase and after so obtaining possession sold it to an innocent purchaser, the party who obtained it by fraud acquired no title and conveyed none to the innocent purchaser, and the owner was entitled to recover the same from such innocent purchaser by replevin.—*The Smith-Premier Typewriter Co. v. Stidger*, 261.

Contracts—Rescission—In an action to rescind a contract to purchase land and to recover back the purchase price on the ground of deceit and false and fraudulent representations by the seller as to the location of the land, the crops it would grow and the depth at which water could be procured, where the evidence shows that plaintiff went upon and examined the premises before purchasing and that the only statements made by the seller as to the crops it would grow and the depth at which water could be found were mere expressions of opinion based on the crops grown and the depth of water on adjacent lands, the court properly directed a verdict for defendant.—*Muir v. Pratt et al.*, 363.

FEES: See SALARIES AND FEES.

FORCIBLE ENTRY AND DETAINER:

Jurisdiction of Court of Appeals—The court of appeals has jurisdiction to review on appeal final judgments of county courts in suits under the forcible entry and detainer act.—*Schafer v. Hegstrom*, 278.

FRANCHISES:

Cities and Towns—Sewers—Statutory Construction—Section 4403, subdivision 10, Mills' Ann. Stats., authorizing cities and towns to construct sewers, regulate their use and to make special assessments against adjacent lots and lands for the purpose of such construction, limits the powers of municipal corporations in relation to sewers to those expressed in said subdivision. An ordinance purporting to grant to a private person an exclusive right and privilege to construct and operate a system of sewers within the limits of a municipal corporation and to collect from all persons using the same a reasonable annual compensation for connecting therewith is absolutely void, and one constructing a sewer system under such ordi-

FRANCHISES—Continued.

nance cannot maintain an action against an inhabitant of the city for the use of the same.—Weaver et al. v. The Canon Sewer Co., 242.

FRAUDULENT CONVEYANCES:

Sales—Personal Property—Possession—Statute of Frauds—To sustain a sale of personal property as against the creditors of the vendor the possession taken and retained by the vendee must be actual, open, notorious, unequivocal and exclusive. There must be no apparent possession left in the vendor. And it is immaterial whether or not the sale was bona fide or whether or not creditors had knowledge of it, unless it was followed by the required change of possession.—Willis v Roberts, 149.

Same—Evidence—Evidence examined and held not sufficient to constitute such change of possession as will sustain a sale of personal property as against creditors of the vendor.—Ib.

Transfer of Property to Corporation—Possession—Attachment—Innocent Purchaser—Preferred Creditor—Where a partnership which was indebted to a greater amount than the value of its assets organized a corporation to which the firm transferred its assets, there being no apparent change in the conduct and management of the business, the same member of the old firm who had charge prior to transfer to the corporation having charge afterwards, the transfer was in fraud of creditors and the property transferred was subject to attachment as the property of the old partnership. And a creditor of the old firm who assisted in the organization of the corporation and purchased a half interest therein with full knowledge of the facts was not an innocent purchaser, neither was he entitled to protection as a preferred creditor.—The Colorado Trading and Transfer Co. v. The Acres Commission Co., 253.

Estates of Decedents—Loan of Funds—Consideration—Attachment—Where the sole legatees of an estate, consisting of personal property against which there were no debts, the legatees being of age, before any distribution was made authorized the executor to loan the funds belonging to the estate to a partnership composed of the executor and another party, the loan created a debt from the partnership to the legatees, that was a sufficient consideration to sustain a transfer of the property of the partnership to said legatees as against the attaching

FRAUDULENT CONVEYANCES—Continued.

creditors of the partnership.—*The Denver Jobbers' Association v. Rumsey et al.*, 320.

Limitation—Conveyances—The owner of a lot without consideration deeded it to his wife. Afterwards with the knowledge and consent of his wife he deeded the same lot to plaintiff in consideration that plaintiff should pay off certain encumbrances on the lot. Plaintiff had no knowledge of the deed to the wife at the time plaintiff accepted the deed from the husband. Plaintiff paid off the encumbrance and went into possession and made valuable improvements on the lot. Afterwards the wife deeded the lot without consideration to another party who executed a trust deed thereto to the wife. Held, that in an action by plaintiff against the husband and wife the wife's grantee and the trustee in the deed of trust, to quiet title, limitation would begin to run from the time the wife deeded the property to another party and not from the date of the deed to plaintiff.—*Arnett v. Berg et al.*, 341.

Juries—Equitable Action—Suit to Cancel Deed—An action to cancel a deed on the ground of fraud in its procurement is an equitable action and it is discretionary with the court whether or not issues of fact shall be submitted to a jury, and a denial of a demand for a jury trial is not error.—*Kyle v. Shore et al.*, 355.

Husband and Wife—Mortgages—Notice—A conveyance of real estate by a husband to his wife in settlement of a bona fide debt owing by him to her is good as against a prior unrecorded mortgage executed by the husband to the same property, where the wife accepted the conveyance in good faith and without notice or knowledge of facts sufficient to charge her with notice of the mortgage.—*Ib.*

GAMING:

Negotiable Instruments—Bank Certificates of Deposit—Indorsement—Gaming Contracts—Lex Loci—Where a certificate of deposit in a Colorado bank was indorsed in another state by the payee in payment of a gaming debt which was again indorsed and passed into the hands of an innocent purchaser, the original indorser cannot avoid liability on his indorsement under section 1344, *Mills' Ann. Stats.*, making all gaming contracts void, and in the absence of a showing of a statute of the state where the indorsement was made which would invalidate his

GAMING—Continued.

indorsement, he will be held liable thereon.—Sullivan et al. v. The German National Bank et al., 99.

Gambling Contracts—Bank Certificate of Deposit—Indorsement—Under section 1344, Mills' Ann. Stats., an indorsement and transfer of a bank certificate of deposit in payment of money lost at gaming is absolutely void and vests no title to the certificate even in an innocent purchaser.—The Western National Bank v. The State Bank, 128.

HUSBAND AND WIFE:

Bankruptcy—Corporations—Property Subject to Debts of Bankrupt—Where a bankrupt merchant became manager of a mercantile company and by his knowledge and skill in the management and control of the business of the corporation greatly enhanced the value of the capital stock of the corporation, the creditors of such bankrupt are not entitled to the enhanced values imparted to said stock by his services. Nor does the fact that the wife of said bankrupt was the principal owner of the stock of the corporation alter the situation.—Campbell v. Thompson et al., 93.

Fraudulent Conveyance—Mortgages—Notice—A conveyance of real estate by a husband to his wife in settlement of a bona fide debt owing by him to her is good as against a prior unrecorded mortgage executed by the husband to the same property, where the wife accepted the conveyance in good faith and without notice or knowledge of facts sufficient to charge her with notice of the mortgage.—Kyle v. Shore et al., 355.

INJUNCTION:

Water Rights—Findings—Decrees—Departure—In an action to enjoin defendant from interfering with plaintiff's easement to flow water through a ditch to irrigate certain land, where the court finds plaintiff entitled to use the ditch in question to carry water to irrigate the land designated, subject however to defendant's rights to carry water to irrigate certain other land, a decree which gives plaintiff the right to use the ditch without regard to whether it is being used by defendant is a departure from the findings and will be modified to correspond with the findings.—Croke v. The American National Bank, 3.

Corporations—Ultra Vires—Suit by Stockholder—A stockholder of a corporation cannot maintain an action to enjoin

INJUNCTION—Continued.

the foreclosure of a deed of trust to corporate property executed by the president and secretary of the corporation, on the ground that it was executed without authority and for the private benefit of the president, without first showing that proper effort had been made to have the action brought by the corporation and that the officers of the corporation had refused to bring the action, and that he had also exhausted all reasonable efforts to obtain relief through the stockholders as a body or that such efforts would be unavailing.—*Smith v. Bulkley et al.*, 227.

Same—Where a corporation was enjoined from bringing any action to prevent a foreclosure sale under a deed of trust to corporate property, the injunction was binding on the stockholders and prevented them from bringing any such action.—*Ib.*

Jurisdiction—The district court of a county is not without jurisdiction to restrain the sheriff of that county from executing a deed for property in that county sold under a special execution, because the judgment on which the execution was issued was rendered by the district court of another county.—*The Ohio-Colorado Mining Co. v. Wiley*, 311.

Action Upon Bond—Attorneys' Fees—Where an injunction was merely ancillary to the principal relief demanded in the action and a demurrer to the complaint and motion to dissolve the injunction were filed at same time and upon hearing the demurrer was sustained and the injunction dissolved, in an action upon the injunction bond to recover attorneys' fees in the matter of dissolving the injunction the plaintiff is entitled to recover only the value of the attorneys' services rendered in securing the dissolution of the injunction and not for any services rendered in the preparation and trial of the main case and, where the evidence was only as to the value of the entire services rendered in the case without any attempt to show what part was properly chargeable for services in securing the dissolution, the plaintiff was not entitled to recover.—*Church et al. v. Baker et al.*, 369.

INJUNCTION BONDS: See **BONDS**.

INSURANCE—ACCIDENT:

Total Disability—Confinement to House—An accident insurance policy promised to pay the insured a certain sum per week if he should be totally disabled and confined to the house. Held, that the total disability contemplated in the

INSURANCE—ACCIDENT—Continued.

policy did not mean absolute helplessness, but that the insured was totally disabled within its meaning if he were entirely incapacitated for work or business, and the fact that he was able to go to his physician's office for treatment did not contradict the fact of his total disability. And he was confined to the house within the meaning of the policy when he was compelled to entirely withdraw from work or business, notwithstanding he was able and did occasionally leave his house and go to his physician's office.—*The Mutual Benefit Association v. Nancarrow*, 274.

Visits of Physician—Pleading—Where an accident insurance policy promised to pay the insured a certain sum per week from the first to the last visit of the attending physician, a complaint which alleged that insured became sick on a certain day and was under the care of a physician until a certain other day named was sufficient to admit proof of the dates of the physician's visits although plaintiff might have been required on motion to make his complaint more definite, and the fact that some of the visits took place at the physician's office instead of the plaintiff's home was immaterial.—*Ib.*

Notice—Pleading—Where a complaint on a policy of accident insurance on its face showed that a liability existed against defendant in favor of plaintiff and the complaint contained no averment of a condition of the policy prescribing the notice to be given to the defendant of the sickness of the insured or of a compliance with such condition, if the defendant desires to rely upon a breach of such condition to escape liability it must plead the condition.—*Ib.*

Evidence—Statements of Deceased—Res Gestae—In an action upon an accident insurance policy where death is alleged to have been caused by accident, an injured condition being shown by other evidence, the cause of the injury can be shown by the statements of the deceased injured party provided such statements constitute part of the *res gestae*.—*The Union Casualty and Surety Co. v. Mondy et al.*, 395.

Same—In an action upon an accident insurance policy where the evidence showed that deceased was a porter on a sleeping car, that the train came to a sudden and violent stop and immediately thereafter deceased was seen standing at a berth partially made down, his head between his hands, complaining of great pain; that he was put to bed and remained there until he arrived home three days thereafter, where he went

INSURANCE—ACCIDENT—Continued.

to bed and was under the care of a physician until his death about twelve days thereafter; that an autopsy disclosed a congested condition of the brain from which he died; that he was a strong healthy man with no symptoms of disease from which the congestion could arise—the statement of the deceased made at the time he was discovered standing at the berth with his head between his hands, to the effect that the berth had fallen and struck him on the head, was admissible in evidence to show the cause of the injury.—Ib.

Condition of Policy—Visible Mark of Injury—A provision in an accident insurance policy to the effect that it does not cover any injury of which there is no visible mark upon the body does not limit the insurance contract to external injuries inflicted upon the surface of the body, but applies as well to internal injuries discoverable and visible upon examination of the body whether such examination be made before or after death.—Ib.

Notice of Injury—Proof of Death—Waiver—An accident insurance policy provided that immediate written notice must be given the company of an injury and that affirmative proof of death must be furnished to the company within two months from the time of death. Insured was confined to his bed from the time of the injury till his death about two weeks, part of the time being unconscious. Three days after his death, notice of the accident was given the company's general agent on a blank form furnished and filled out by the agent. The representative of deceased called on the agent several times for blanks for making proofs. The agent requested him to delay the matter assuring him that the rights of the beneficiaries should not be prejudiced. After two months had expired the company furnished the representative the blanks upon which proof was made. No objection was ever made that notice was not given in time nor that the proof of death was furnished too late, until the company filed its answer to the suit on the policy. Refusal of payment was made on the ground that the deceased died a natural death. Held, that the company had waived objection to the failure to give notice and furnish proofs in the time required.—Ib.

INSURANCE—FIRE:

Mortgage Clause — Appraisement — Rights of Mortgagee — Pleading—A policy of fire insurance containing the union mort-

INSURANCE—FIRE—Continued.

gage clause was issued on a building covered by a deed of trust and was assigned as collateral security to the trustee as additional security to the mortgage debt. The policy also provided that in case of loss or damage the value should be ascertained or estimated by the insured and the insurance company. In an action on the policy by the trustee for the loss caused by the destruction of the building by fire, the plaintiff was not bound by an agreement between the company and the insured as to the amount of the loss, and a demurrer was properly sustained to an answer setting up such agreement at a less sum than the face of the policy and making tender of such agreed sum.—*The Scottish Union and National Insurance Co. v. Field*, 68.

Contracts—Principal and Agent—In an action by an insurance company against its local agent to recover premiums collected to its use, a counterclaim by defendant alleging a contract whereby plaintiff agreed in case it withdrew from the insurance business in defendant's territory nothing should be done to disturb the business on defendant's books, but that defendant should have the option to reinsure all of its business in other companies or to take up all policies then in force at pro rata premiums less the cost of obtaining the same, and a breach of said contract whereby plaintiff without defendant's knowledge or consent retired from business in defendant's territory and caused its business to be reinsured by another insurance company without notice to defendant and without giving him an opportunity to exercise his option as provided in the contract, states a cause of action against the insurance company.—*Appelman v. The Broadway Insurance Co.*, 110.

INSURANCE—LIFE:

Cause of Death—Burden of Proof—In an action upon a policy of life insurance where the defendant answered that death was caused by the intentional taking by deceased of an overdose of a narcotic drug, the burden is on the defendant to prove that the drug is a narcotic and that death was caused by an overdose thereof.—*The Denver Life Insurance Co. v. Price*, 30.

Same—Appellate Practice—Findings—In an action upon a policy of life insurance a finding of the trial court upon conflicting evidence as to whether or not death was caused by an overdose of a narcotic drug is conclusive upon the appellate court where there is sufficient evidence to support the finding.—*Ib.*

INSURANCE—LIFE—Continued.

Cause of Death—Proofs—Evidence—In an action upon a policy of life insurance plaintiff was not concluded by the statement of the physician in the proof of death furnished to the company as to the cause of the death of insured, but could contradict such statement by other evidence where defendant was notified by the pleading that plaintiff would dispute such statement.—*Ib.*

Lapsed Policy—Reinstatement—A policy of life insurance was declared forfeited for failure to pay the premium due, and the insured was reinstated in a policy of a smaller amount which he accepted and paid the premium due. In an action upon the reinstated policy where the company defended on the ground that the policy had been cancelled by the company because of false representations as to health made in the application for reinstatement, a judgment in plaintiff's favor on the sole ground that the first policy had not lapsed for the reason that the company failed to give notice that the premium was due as required in the policy, was rendered upon an issue not in the case, and where there was no finding of the trial court upon the question of the false representations of the insured in his application for reinstatement, which was the only issue in the case, the judgment must be reversed.—*The Denver Life Insurance Co. v. Bucknum*, 209.

Fraud—Action for Premium—Counterclaim—Estoppel—Plaintiffs as insurance agents contracted with defendant to furnish defendant a certain specified kind of policy of insurance and for the first year's premium defendant executed two promissory notes due at different times. When the policy was delivered one of the plaintiffs pretended to read to defendant a part of it which indicated that it was in accordance with the agreement and told defendant that such was the case. Relying upon plaintiff's representations defendant paid the first note and laid the policy away without reading. In an action by plaintiffs on the second note nine months after the delivery of the policy, defendant pleaded fraud practiced upon him in delivering to him a different policy than that represented and set up a counterclaim for the sum paid on the first note. Held, that plaintiffs were not entitled to set up in defense of their own wrong that defendant was estopped to object to the policy because of his negligence in not objecting thereto for an unreasonable length of time, and it was error to dismiss defendant's counterclaim on that ground.—*Lemond v. Harrison et al.*, 246.

INSTRUCTIONS:

Appellate Practice—Abstract of Record—Assignments of error based on alleged erroneous instructions will not be considered unless the instructions are contained in the abstract of record. *Lowenstein v. Alexander*, 22.

Sales—Breach of Contract to Buy—Measure of Damage—Market Price—Cost of Production—In an action for damages for breach of contract to purchase the output of a coal mine, if the output of the mine could have been sold in the market at a price above the cost of production the measure of plaintiff's damage would be the difference between the price agreed to be paid by defendant and the market price. And in the absence of a showing that there was no market value, an instruction that the measure of damage was the difference between the contract price and the cost of producing the coal named in the contract was erroneous.—*Kincaid et al. v. Price et al.*, 73.

Contributory Negligence—In an action against a city for injuries to plaintiff caused by his vehicle while driving along a public street coming in contact with a concealed and dangerous fireplug, where defendant claimed that the injury was the result of plaintiff's own negligence in driving along the street at a furious and unlawful rate of speed, an instruction that if the jury found from the evidence that plaintiff was traveling at a furious and rapid rate of speed and that such act was the cause of the injury it was immaterial whether such traveling was intentional or the result of his inability to restrain his horse he was guilty of contributory negligence and could not recover, was erroneous.—*Thunborg v. The City of Pueblo*, 80.

Mortgages—Wrongful Sale by Mortgagee—Measure of Damage—Conflicting Instructions—In an action for damage for a wrongful sale of land by defendant which plaintiff had mortgaged to defendant by a deed absolute in form and for refusing to permit plaintiff to redeem, where the court in one section of its instructions told the jury that the measure of damage was the difference between the sum of the liens on the land and the amount for which it was sold by defendant, provided it was not sold for less than its market value, and in another section that the measure was the difference between the market value at the time of sale and the price for which it was sold by defendant, and in another section that plaintiff was entitled to recover the entire purchase price with interest, and it does not appear which rule the jury adopted, even if any one of the rules laid down for the measure of damage was correct, the instruc-

INSTRUCTIONS—Continued.

tions are so conflicting that a verdict and judgment based thereon should be reversed.—*Arnett v. Huggins*, 115.

Same—In an action for damage for a wrongful sale by defendant of land held by him under a deed from plaintiff absolute in form but in fact a mortgage, and for refusing to allow plaintiff to redeem, where the answer tendered other issues and there was evidence tending to support them, it was error to instruct the jury that the only question before it was the measure of damage.—*Ib.*

Cities and Towns—Negligence—Defect Cured—In an action against a city an instruction that the city was "bound to use all reasonable care, caution and supervision to keep its streets and sidewalks in safe condition for travel, in the ordinary modes of travel," was not misleading because it failed to qualify the word "safe" with the word "reasonably." But if it was faulty it was cured by a subsequent instruction in which the accurate phraseology was employed.—*The City of Denver v. Murray*, 142.

Omission—Failure to Request—Where an instruction was correct as far as it went and the only objection to it is that it did not go far enough, it is too late to complain of the instruction on appeal where the complaining party did not ask the trial court to supply the omission.—*Ib.*

Cities and Towns—Negligence—Notice—In an action against a city where the undisputed facts showed that the dangerous obstruction of the street complained of had existed for such a length of time that the city was charged by law with notice and with the duty of removing it and it would have been proper to so instruct the jury, the city is not in a position to complain of an instruction given upon the question of notice.—*Ib.*

Conclusively Established Facts—An instruction is faulty which leaves conclusively established facts to the jury.—*Ib.*

Cities and Towns—Obstruction of Streets—In an action against a city for an injury caused by the falling of a derrick where the undisputed evidence showed that the derrick stood in the street in close proximity to a schoolhouse and was attractive to the school children, who were in the habit of playing upon it, it was not erroneous for the court to refer to the derrick as "said obstruction."—*Ib.*

Same—In an action against a city for injuries to a child caused by the falling of a derrick which had been left standing in the street in close proximity to a school which was attended by plaintiff for at least a year, and which was attractive to the

INSTRUCTIONS—Continued.

children to play upon, the fact that the derrick was tied to a stump by a rope which was liable at any time to be severed accidentally or heedlessly by the children playing upon it did not palliate the negligence of the city in failing to have it removed, and it was not error for the court to instruct the jury that it was immaterial whether or not it was tied.—*Ib.*

Conveyances—Consideration—Parol Agreement—Evidence—In an action by a grantor against a grantee to collect an additional consideration over and above that recited in the deed upon an oral promise of the grantee, an instruction which told the jury that the written instruments were presumed to contain all the agreements of the parties and that the burden was upon the plaintiff to establish the oral agreement by a preponderance of evidence and that the evidence must be so clear as to satisfy the jury that such agreement was made, was sufficient. It was not the duty of the court to require the jury to find the establishment of the parol agreement beyond a reasonable doubt.—*Cheesman v. Nicholl*, 174.

Principal and Agent—Commission—Sale of Real Estate—Evidence—In an action by real estate agents for commission under a specific contract of agency in writing, where plaintiffs based their cause of action on the ground that a sale had been effected through their efforts, and where there was evidence tending to show that negotiations were pending between defendant and the purchaser through other agents prior to the time defendant gave to plaintiffs the agency, and that said negotiations subsequently resulted in a sale, it was error to instruct the jury not to consider any proposition of sale or trade between any parties and defendant prior to the agency contract between defendant and plaintiffs.—*Smiley v. Bradley et al.*, 191.

Attachment—Fraud—Evidence—In an attachment suit where there is no evidence that the defendants fraudulently contracted any part of the indebtedness involved in the suit, the court should not submit such question to the jury.—*The Denver Jobbers' Association v. Rumsey et al.*, 320.

Appellate Practice—Exceptions—An exception to instructions as follows: "To the giving of which instructions Nos. 1 to 9 inclusive, and each of them, contestants by their counsel then and there specifically excepted," is sufficient to present the instructions for review on appeal.—*Rice et al. v. Williams et al.*, 330.

INSTRUCTIONS—Continued.

Appellate Practice—Record—Evidence—In order to have instructions reviewed by the appellate court the record must present all the instructions given and the evidence upon which they were based.—*Ib.*

Appellate Practice—Abstract of Record—Assignments of error based on the refusal of the court to give instructions requested will not be considered unless the abstract of record presents all the instructions given.—*The City of Pueblo v. Froney et al.*, 351.

Not Based on Evidence—Where defendant verbally promised to pay to plaintiff the store account of his tenant after the goods had been sold and charged to the tenant, and there was no evidence of any consideration passing from plaintiff to defendant or that plaintiff released the tenant and accepted defendant as his debtor, an instruction to the effect that where there is a consideration for the promise to pay, it is unnecessary for it to be in writing and that to warrant a finding for plaintiff it must appear that he accepted defendant and released the tenant, was prejudicial error.—*Burson v. Bogart*, 449.

Negligence—Damages—Interest—In an action for damages for personal injury where the prayer of the complaint asked for interest upon the damages to be assessed, it was not prejudicial error to refuse a requested instruction by defendant that no interest could be allowed where the instructions given upon the measure of damage confined the jury to an ascertainment of the actual damage sustained and left no room for an allowance of interest.—*Trumbull v. Donahue*, 460.

Negligence—Evidence—In an action against a street railway company for running its car over and killing a child, the court properly refused to submit to the jury the question of defendant's negligence in failing to provide the car with suitable contrivances for avoiding accidents of the kind, where there was no evidence upon which to predicate such instructions.—*Zimmerman et al. v. The Denver Consolidated Tramway Co.*, 480.

Negligence—Measure of Damages—Harmless Error—In an action for damages for personal injuries alleged to have been caused by defendant's negligence where the verdict of the jury is for the defendant, errors committed in instructions upon the question of the measure of damage are not prejudicial and will not justify a reversal.—*Ib.*

INTEREST:

Pleading—Certificate of Indebtedness—A written certificate of indebtedness will draw interest at eight per cent. per annum. In an action upon such certificate an answer that merely denies that any interest is due or owing on the indebtedness does not put in issue any material allegation of the complaint.—*The Midland Fuel Co. v. Schuessler*, 386.

Negligence—Damages—Instructions—In an action for damages for personal injury where the prayer of the complaint asked for interest upon the damages to be assessed, it was not prejudicial error to refuse a requested instruction by defendant that no interest could be allowed where the instructions given upon the measure of damage confined the jury to an ascertainment of the actual damage sustained and left no room for an allowance of interest.—*Trumbull v. Donahue*, 460.

JUDGMENTS:

Water Rights—Findings—Decrees—Departure—In an action to enjoin defendant from interfering with plaintiff's easement to flow water through a ditch to irrigate certain land, where the court finds plaintiff entitled to use the ditch in question to carry water to irrigate the land designated, subject however to defendant's rights to carry water to irrigate certain other land, a decree which gives plaintiff the right to use the ditch without regard to whether it is being used by defendant is a departure from the findings and will be modified to correspond with the findings.—*Croke v. The American National Bank*, 3.

Default—Motion to Set Aside—Meritorious Defense—Excusable Neglect—The mere fact that a defendant had a meritorious defense to an action is not sufficient to set aside a default and judgment against him, but he must show that his neglect in permitting the judgment to be taken against him was excusable.—*Barra v. The People*, 16.

Same—Negotiations of Settlement—A motion to set aside a default and judgment which alleges that the neglect to plead was because of negotiations looking toward a settlement, but which fails to allege with whom the negotiations were held and in what they consisted, is insufficient to state a cause of excusable neglect.—*Ib.*

Same—Forfeited Recognizance—Search for Defendant—The fact that the surety upon a forfeited recognizance was at the time making search for his absconding principal with a view of procuring his presence in court does not excuse his neglect to

JUDGMENTS—Continued.

plead to an action upon the forfeited recognizance and is not a sufficient showing to set aside a default judgment.—*Ib.*

Summons—Default—Motion to Set Aside—Appearance—A motion to set aside a default judgment on account of excusable neglect was a general appearance and waived the right to question the sufficiency of the summons.—*Ib.*

Parties—Mechanics' Liens—In an action for a personal judgment against the owner and to enforce a mechanic's lien on real estate where plaintiffs claimed under a contract originally made with a contractor under defendant, but which defendant assumed and made his own contract before plaintiffs commenced work thereunder, and in which action said contractor was joined as a party defendant, the fact that no final disposition was made of the case as to said contractor would not affect the validity of a personal judgment against the owner or a lien decreed upon the real estate.—*Harris et al. v. Harris*, 34.

Assignment—Payment—Plaintiff, a debtor, gave to N., a creditor, an order on a third party which was to be credited on his indebtedness to N. The order was accepted by the drawee and was assigned by N. to defendants who were also creditors of plaintiff, in consideration of which defendants agreed to assign their judgment against plaintiff to N. For some reason the judgment was not assigned and afterwards by attachment and garnishment defendant collected said judgment. Held, that the assignment of the order by N. to defendants and the agreement of defendants to assign their judgment against plaintiff to N. was not a payment and satisfaction of said judgment, but was a transaction between defendants and N. with which plaintiff had no concern and plaintiff could not maintain an action to recover back the money collected by defendant on the judgment by garnishment.—*Crotser et al. v. Lamont*, 167.

Appellate Practice—Judgment in Favor of Appellant—Bills and Notes—Where action was brought upon a promissory note with a prayer to have it declared a lien upon real estate and plaintiff recovered personal judgment on the note but the other relief prayed for was denied, the final judgment was in plaintiff's favor and he is not entitled to an appeal therefrom but may have the same reviewed in the court of appeals by writ of error, and where an appeal was taken by plaintiff from such judgment to the court of appeals it will be dismissed and redocketed on error.—*Patrick et al. v. Morrow*, 222.

JUDGMENTS—Continued.

Appellate Practice—Final Judgments—Assignment Proceedings—An order in an assignment proceeding denying a motion of attorneys selected by a majority of the creditors to represent the creditors of the estate, to have their appointment made a matter of record and the assignee instructed to recognize them as attorneys for the estate and to give them all business where an attorney's services were needed in said assignment proceeding, was not such final judgment as may be reviewed by the court of appeals either upon appeal or writ of error.—*Tolles et al. v. Spencer*, 294.

Pleading—Practice—Joint Judgment—Harmless Error—Where a complaint stated a separate cause of action against each of two defendants and the cause was proven as to each, the fact that a joint judgment was rendered against the two was not prejudicial error.—*Johnson et al. v. Bott*, 469.

Judgment Liens—Where land was deeded to one person for the use of others by a deed which merely expressed a passive trust and such deed was recorded, a title in fee was thereby vested in the cestuis que trust, and a transcript of judgment against the cestuis que trust being filed, the judgment lien thus created in favor of the judgment creditors was superior to any secret lien or trust existing in favor of the trustee created by oral agreement between the trustee and the cestuis que trust of which the judgment creditors had no notice.—*Teller v. Hill*, 509.

Same—Attorneys' Liens—Where land was conveyed to a trustee for the use of other parties by a deed which expressed a mere passive trust which deed was recorded, a judgment lien created by filing a transcript of judgment against the cestuis que trust was superior to an attorney's lien in favor of the trustee of which the judgment creditors had no notice.—*Ib.*

Contracts—Accord and Satisfaction—Defendants having a judgment against plaintiff with a decree of foreclosure on plaintiff's mine, entered into a contract with plaintiff whereby defendants agreed to accept within a certain time a certain sum with interest in satisfaction of the judgment, and plaintiff's lessee was to pay to defendants a certain part of the royalties due plaintiff under the lease as such royalties fell due, to be applied on the sum agreed to be paid in satisfaction of the judgment, and in any event the amounts so paid to be credited on the judgment and not to be recoverable back by plaintiff and the parties agreed to stay further legal proceedings for the

JUDGMENTS—Continued.

time mentioned, the defendant to forbear the enforcement of his foreclosure decree, and plaintiff agreed to sue out no writ of error during the time, and the sum agreed on not having been paid within the time, another contract was executed extending the time for payment with a stipulation if not paid within the time as extended defendants were to be relegated to their rights under the decree. Held, that the contracts were not an accord and satisfaction of the judgment and decree, and that the amount agreed on not having been paid within the time, defendants could proceed to foreclose for the amount of the judgment less the payments made under the contracts.—*The Tabor Mines and Mills Co. v. Newell*, 520.

JURIES:

Equitable Action—Suit to Cancel Deed—An action to cancel a deed on the ground of fraud in its procurement is an equitable action and it is discretionary with the court whether or not issues of fact shall be submitted to a jury, and a denial of a demand for a jury trial is not error.—*Kyle v. Shore et al.*, 355.

Mines and Mining—Adverse Suit—View of Premises—In an adverse suit to determine the right to a mining claim where the plaintiff's claim was put in issue by the pleading and he introduced no evidence whatever in support of his claim, he was not entitled to demand a view of the premises by the jury as provided in section 188a, Mills' Ann. Code, and a denial of such demand by the trial court was not error.—*Connolly v. Hughes et al.*, 372.

JURISDICTION:

Appellate Practice—Jurisdiction of Court of Appeals—Special Proceedings—Cities and Towns—The statute conferring jurisdiction upon the court of appeals to review the final judgments of inferior courts in civil cases applies only to final judgments or decrees in actions at law or suits in equity, and does not apply to special statutory proceedings. The court of appeals has no jurisdiction to review a judgment of the county court in a proceeding under the act (Session Laws 1901, page 386) providing for the disconnection of outlying territory from cities and towns.—*The Town of Fletcher v. Smith*, 201.

Same—Appearance—Waiver—In an appeal from the county to the district court of a cause wherein the district court had original jurisdiction where the appellees moved to dismiss the

JURISDICTION—Continued.

appeal because of a defective appeal bond which was denied and the appellees did not stand on their motion but proceeded to take part in the trial of the cause upon its merits, they thereby entered their general appearance and waived all irregularities in the manner of the appeal affecting the court's jurisdiction of their persons.—*Engel et al. v. Atkinson et al.*, 267.

Forcible Entry and Detainer—Jurisdiction of Court of Appeals—The court of appeals has jurisdiction to review on appeal final judgments of county courts in suits under the forcible entry and detainer act.—*Schafer v. Hegstrom*, 278.

Mandamus—Appellate Practice—Jurisdiction of Court of Appeals—The court of appeals has jurisdiction to review either on appeal or writ of error a final judgment of an inferior court of record in a mandamus proceeding.—*Orman et al. v. The People ex rel. Cooper*, 302.

Elections—State Board of Canvassers—Mandamus—The duties of the state board of canvassers in canvassing the returns of an election for representative in the general assembly are purely political and governmental, and the courts have no jurisdiction to control its action therein by mandamus.—*Ib.*

Same—Discretion—Even if the courts had jurisdiction to mandamus the state board of canvassers the writ would lie only to command the board to act, and not to control their discretion by commanding them how to act in a case where there were presented to them what purported to be two sets of abstracts of votes each claiming to be the correct one.—*Ib.*

Injunction—The district court of a county is not without jurisdiction to restrain the sheriff of that county from executing a deed for property in that county sold under a special execution, because the judgment on which the execution was issued was rendered by the district court of another county.—*The Ohio Colo. Mining Co. v. Wiley*, 311.

County Courts—Equity—County courts have jurisdiction of suits in equity where the value of the property in controversy does not exceed two thousand dollars.—*Arnett v. Berg et al.*, 341.

Towns—Incorporation—Contesting Validity—Mandamus—In a proceeding to incorporate a town the county court has not jurisdiction to consider a protest against the incorporation on the ground that the petitioners for incorporation are not land owners as contemplated by law. And where a county judge refused to furnish the petitioners a certified copy of such proceeding to be filed in the recorder's office, on the ground that subsequent

JURISDICTION—Continued.

to holding the election and publishing the result a protest had been filed, mandamus will go to compel him to certify the proceeding.—*Eldred v. Johnson*, 384.

Receivers—Assignment for Benefit of Creditors—A receiver appointed by the district court to take possession of the assets of an insolvent defendant is entitled to administer such assets in preference to an assignee under an assignment for the benefit of creditors made by said defendant pending the action in which the receiver was appointed and prior to his appointment, but after the court had acquired jurisdiction in the action for his appointment by the filing of the complaint and service of summons.—*Flint v. Powell*, 426.

LANDLORD AND TENANT:

Statute of Frauds—Promise to Pay Debt of Another—Where plaintiff sold to a tenant goods and charged them upon his books to such tenant, a promise by the landlord to pay such account, made without consideration, was a promise to pay the debt of another within the statute of frauds, and was not binding unless made in writing.—*Burson v. Bogart*, 449.

LEASE: See MINES AND MINING.

LEX LOCI:

Negotiable Instruments—The liabilities and obligations of an indorser of a negotiable instrument are determined by the law of the place where the indorsement is made even though the instrument indorsed is expressly made payable elsewhere.—*Sullivan et al. v. The German National Bank et al.*, 99.

Law of Other State—Presumption—Where the law of another state becomes material and there has been no evidence offered concerning it, our courts will presume that the general principles of the common law prevail there the same as in this state, but it will not be presumed that such other state has adopted the same or similar statutes as have been adopted in this state.—*Ib.*

Negotiable Instruments—Bank Certificates of Deposit—Indorsement—Gaming Contracts—Lex Loci—Where a certificate of deposit in a Colorado bank was indorsed in another state by the payee in payment of a gaming debt which was again indorsed and passed into the hands of an innocent purchaser, the original indorser cannot avoid liability on his indorsement under section 1344, *Mills' Ann. Stats.*, making all gaming contracts void, and

LEX LOCI—Continued.

in the absence of a showing of a statute of the state where the indorsement was made which would invalidate his indorsement, he will be held liable thereon.—*Ib.*

LIMITATION:

Fraud—Conveyances—The owner of a lot without consideration deeded it to his wife. Afterwards with the knowledge and consent of his wife he deeded the same lot to plaintiff in consideration that plaintiff should pay off certain encumbrances on the lot. Plaintiff had no knowledge of the deed to the wife at the time plaintiff accepted the deed from the husband. Plaintiff paid off the encumbrance and went into possession and made valuable improvements on the lot. Afterwards the wife deeded the lot without consideration to another party who executed a trust deed thereto to the wife. Held, that in an action by plaintiff against the husband and wife the wife's grantee and the trustee in the deed of trust, to quiet title, limitation would begin to run from the time the wife deeded the property to another party and not from the date of the deed to plaintiff.—*Arnett v. Berg et al.*, 341.

Bills and Notes—Payment—Joint Makers—Payments made upon a promissory note by one of two joint makers will not stop the running of the statute of limitation as to the other maker.—*Coulter et al. v. The Bank of Clear Creek County*, 444.

MANDAMUS:

Cities and Towns—Elections—Office of Mayor—Filling Vacancy—Under section 4488, Mills' Ann. Stats., providing that in case a vacancy occurs in the office of mayor of a city, the city council shall order a special election as soon as practicable to fill the vacancy, it is the duty of the city council to order such special election at its first regular session after a vacancy occurs, and in case of a failure or refusal to do so, mandamus will lie to compel them to order such election.—*Rizer et al. v. The People*, 40.

Same—Demand—Where a city council failed to order a special election to fill a vacancy in the office of mayor as required by statute, no formal demand on the council to order such election was necessary before commencing an action of mandamus to compel them to do so.—*Ib.*

Same—Relators—Where a city council fails to order a special election to fill a vacancy in the office of mayor as required by

MANDAMUS—Continued.

statute, mandamus may be instituted to compel them to do so upon the relation of private citizens.—Ib.

School of Mines—Board of Trustees—Diplomae—The board of trustees of the school of mines has no authority to issue a diploma to a student of the school except when required to do so by the school speaking through its faculty. And mandamus will not lie to compel the board of trustees to issue such diploma where the plaintiff has failed to pass the examination required by the faculty, although his failure may have been chargeable to the hostility and wrongful conduct of the faculty.—Steinhauer et al. v. Arkins, 49.

Legal Duty—Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.—The Board of Trustees of the Town of Montrose v. Endner, 65.

Pleading—Cities and Towns—Appropriation—A petition for a writ of mandamus to compel the board of trustees of an incorporated town to allow a claim of the petitioner against the town for coal furnished to the town and to order a warrant drawn for its payment which fails to allege that a previous appropriation had been made concerning such expense is fatally defective.—Ib.

Tax Sales—Redemption—Equity—Parties—Where land covered by a deed of trust was sold for taxes part of which were assessed against the land and part of which were assessed as personal tax of the owner, in a proper proceeding the beneficiary of the trust deed is entitled to a release as to his interest in the land from the tax sale by payment only of the amount properly chargeable against the land, but mandamus will not lie against the county treasurer to compel him to release said land from the tax sale except upon payment of the entire amount for which it was sold with interest and penalties. The proper remedy would be a proceeding in equity against the holder of the certificate of purchase.—Statton v. The People, 85.

Appellate Practice—Jurisdiction of Court of Appeals—The court of appeals has jurisdiction to review either on appeal or writ of error a final judgment of an inferior court of record in a mandamus proceeding.—Orman et al. v. The People ex rel. Cooper, 302.

Elections—State Board of Canvassers—Jurisdiction—The duties of the state board of canvassers in canvassing the returns of an election for representative in the general assembly are

MANDAMUS—Continued.

purely political and governmental and the courts have no jurisdiction to control its action therein by mandamus.—Ib.

Same—Discretion—Even if the courts had jurisdiction to mandamus the state board of canvassers the writ would lie only to command the board to act, and not to control their discretion by commanding them how to act in a case where there were presented to them what purported to be two sets of abstracts of votes, each claiming to be the correct one.—Ib.

Anticipation—The writ of mandamus will not issue in anticipation of an omission to perform a duty or because the relator fears there will be an omission, but there must be shown an actual failure or refusal to perform the duty before a writ of mandamus can issue to compel its performance.—Ib.

Towns—Incorporation—Contesting Validity—Jurisdiction—In a proceeding to incorporate a town the county court has not jurisdiction to consider a protest against the incorporation on the ground that the petitioners for incorporation are not land owners as contemplated by law. And where a county judge refused to furnish the petitioners a certified copy of such proceeding to be filed in the recorder's office, on the ground that subsequent to holding the election and publishing the result a protest had been filed, mandamus will go to compel him to certify the proceeding.—*Eldred v. Johnson*, 384.

Bills of Exception—Mandamus may issue to compel a judge to sign a bill of exceptions after it has been settled, but the duty of settling the bill, that is, determining what it shall embrace, is judicial, and where a judge refuses to sign a bill because it does not include matter which he thinks ought to be included, mandamus will not issue to compel him to sign it.—*The Lockhaven Trust and Safe Deposit Co. v. The U. S. Mortgage and Trust Co.*, 447.

MASTER AND SERVANT:

Negligence—Safe Appliances—It is the duty of a master to exercise reasonable care in providing the servant proper machinery and appliances and in fit condition for use, for the performance of the work required of him, but where the master has provided upon the premises and within reach of his servant suitable appliances, he is not liable for injuries to the servant caused by his failure to use the appliances furnished.—*Floyd v. The Colorado Fuel & Iron Co.*, 153.

MASTER AND SERVANT—Continued.

Same—Fellow Servant—Assumption of Risk—Plaintiff had charge of the cupolas of the converting department of defendant's iron works. D. had charge of the machinery of the same department. Each had men under him but neither was under or subject to the order of the other, both being subject to orders of the superintendent. The superintendent ordered plaintiff to take his men and replace a runner that had burned out with a new one, and was told by plaintiff that it could not safely be done without a block and fall, whereupon the superintendent said he would send D. with the block and fall, and directed plaintiff to assist him in replacing the runner. Shortly afterwards D. appeared without the block and fall, and upon being asked by plaintiff where it was, answered that it was down in the engine room, but that he was in a hurry and had not time to get it, and directed plaintiff to proceed without it. In attempting to replace the runner without the block and fall, plaintiff was injured. Held, that plaintiff took his own chances in following the directions of D. and voluntarily assumed the risk of injury incident to the attempt to replace the runner without the block and fall, and defendant was not liable for such injury.—1b.

Negligence—Fellow Servants—Defendant was the owner of a mine and mill connected by a tramway used to haul the ore from the mine to the mill. The mill was only used to crush ore from defendant's mine, and the mine and mill were operated as one enterprise. Held, that plaintiff, the superintendent of the mill, whose duty it was to operate it, and the employees at the mine who handled the ore, were fellow servants and an injury to plaintiff caused by a sledgehammer being negligently mingled with the ore at the mine and shipped to and fed into the mill was the result of the negligence of a fellow servant for which defendant was not liable.—*Molique v. The Iowa Gold Mining and Milling Co.*, 223.

Negligence—Assumption of Risk—An employee assumes all the risks incident to his service which arise from defects or imperfections in the thing about which he is employed of which he had knowledge or means of knowledge equal to that of his employer.—*Harvey v. The Mountain Pride Gold Mining Co.*, 234.

Same—Mines and Mining—The workings of defendant's mine consisted of a tunnel connecting with a shaft so that a draft of air passed into the tunnel and out at the shaft. A bunk house was situated at the mouth of the tunnel consisting of a small building on each side, the space between being roofed over and

MASTER AND SERVANT—Continued.

forming the entrance to the tunnel. No special means were provided for extinguishing or checking fire. A fire occurred in the bunk house and was communicated to the timbers in the tunnel and caused the death of plaintiff's husband, who was at work in the shaft. Deceased had experience in the work about mines and had been in defendant's employ one month, sleeping in the bunk house, and never made any complaint as to the dangerous condition of the mine, and defendant had made no promise in reference thereto. Held, that deceased assumed the risk arising from the location of the bunk house at the mouth of the tunnel and plaintiff was not entitled to recover from defendant damages for the death of her husband.—*Ib.*

Negligence—Safe Place to Work—Delegation of Duty—Vice-Principal—The master is bound to use reasonable care in providing for the safety of his servants. It is his duty to furnish safe and suitable appliances and keep them in proper condition for use. Knowledge of defects in the appliances to which danger is incident, is imputed to him if by the exercise of reasonable diligence he might have discovered and remedied them. And he cannot escape liability for neglect of his duty by delegating its performance to an employee. By the delegation the employee, without regard to his rank or the grade of his employment, becomes a representative of the master, and his negligence is the master's negligence. But this rule does not apply to appliances which are not furnished by the master and which the law does not charge him with the duty of providing.—*McKean v. The Colo. Fuel & Iron Co.*, 285.

Same—Plaintiff was an employee of defendant working in the second story of defendant's engine room. A safe passageway or balcony was constructed entirely around the room of said second story, but a part of the floor of said passageway had been removed for the purpose of letting certain machinery pass through. For convenience in passing from one side to the other of this opening and to save the trouble of walking around the room, some of defendant's employees placed a plank across the opening in the floor on which the employees were in the habit of crossing. Plaintiff in attempting to cross on said plank fell and was injured. Held, that plaintiff took upon himself the risk of crossing on said plank and defendant was not liable. And the fact that the foreman under whose direction plaintiff was working but who had nothing to do with the construction of the passageway had crossed on the plank and called to other em-

MASTER AND SERVANT—Continued.

ployees to come on immediately before plaintiff attempted to cross, did not relieve plaintiff of the duty to use the passageway constructed by defendant for his use nor charge defendant with responsibility for the danger connected with the use of the plank.—*Ib.*

Negligence—Invisible Danger—Duty of Employer to Warn Employee—Where an employer inducts an employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, it is the duty of the employer to impart to the employee his own knowledge of the situation, and his failure to do so would be negligence which would render the employer liable for an injury to the employee resulting from such invisible danger.—*Holshouser v. The Denver Gas and Electric Co.*, 431.

Same—Striking Employees—Where an employer employed an employee knowing that such employee was in danger of being injured by striking employees and the employee had no knowledge of such danger, and the employer failed to warn him of the danger, the employer is liable for an injury to such employee by the striking employees.—*Ib.*

Negligence—Safe Appliances—If a master has furnished his servant with proper machinery and appliances for the performance of the work required of the servant, it is no part of the master's duty to see that the servant makes use of such machinery and appliances so furnished.—*Kellogg v. The Denver City Tramway Co.*, 475.

Same—Repairing—Where a servant is employed to put a thing or place in a safe and suitable condition for use, it is not the master's duty to have such place or thing in safe condition and good repair for the purpose of such employment.—*Ib.*

Same—Electric Railways—Linemen—An electric railway company who employed a lineman whose duty it was to repair its poles and wires and to go upon the poles for the purpose of taking down and putting up wires did not owe to such employee the duty to inspect its poles and inform him whether or not any of them were so decayed as to be unsafe to work upon.—*Ib.*

Same—Plaintiff was employed by defendant, an electric railway company, as a lineman. Plaintiff had been engaged in the business of lineman and electric work several years and had been at work for defendant for three months. Plaintiff was supplied with proper appliances for bracing and strengthening poles which he might be required to climb. Held, that defendant was

MASTER AND SERVANT—Continued.

not liable for an injury to plaintiff caused by a pole which had rotted at the ground breaking and falling while plaintiff was upon it for the purpose of repairing the wires, and which plaintiff had neglected to brace or prop before going upon it.—Ib.

MEASURE OF DAMAGE: See DAMAGES.

MECHANICS' LIENS:

Judgments—Parties—In an action for a personal judgment against the owner and to enforce a mechanic's lien on real estate where plaintiffs claimed under a contract originally made with a contractor under defendant, but which defendant assumed and made his own contract before plaintiffs commenced work thereunder, and in which action said contractor was joined as a party defendant, the fact that no final disposition was made of the case as to said contractor would not affect the validity of a personal judgment against the owner or a lien decreed upon the real estate.—Harris et al. v. Harris, 34.

MINES AND MINING:

Mining Claims—Filing Adverse—Pleading—Presumption—In an adverse suit where the complaint alleged the filing of the adverse in the United States land office it will be presumed that it was filed within the time prescribed by the United States statutes for such filing.—The Pennsylvania Mining Co. of Colorado v. Bales, 108.

Same—Waiver—In an adverse suit if the defendant desires to raise the question that the adverse was not filed in the United States land office within sixty days after publication or that the adverse suit was not filed within thirty days from the filing of the adverse in the land office, he must raise such question either by demurrer or answer, and if he goes to trial without having done so he waives the objections.—Ib.

Adverse Suits—Time of Filing—Pleading—Where the file marks on a complaint in an adverse suit show that it was filed within thirty days from the filing of adverse in the land office, it was not necessary to allege in the complaint that it was filed within said time.—Ib.

Negligence—Master and Servant—Assumption of Risk—The workings of defendant's mine consisted of a tunnel connecting with a shaft so that a draft of air passed into the tunnel and out at the shaft. A bunk house was situated at the mouth of the tunnel, consisting of a small building on each side, the space

MINES AND MINING—Continued.

between being roofed over and forming the entrance to the tunnel. No special means were provided for extinguishing or checking fire. A fire occurred in the bunk house and was communicated to the timbers in the tunnel and caused the death of plaintiff's husband who was at work in the shaft. Deceased had experience in the work about mines and had been in defendant's employ one month, sleeping in the bunk house, and never made any complaint as to the dangerous condition of the mine, and defendant had made no promise in reference thereto. Held, that deceased assumed the risk arising from the location of the bunk house at the mouth of the tunnel and plaintiff was not entitled to recover from defendant damages for the death of her husband.—*Harvey v. The Mountain Pride Gold Mining Co.*, 234.

Corporations—Liability of Stockholders—Mining Claims—Failure to Discover Mineral—Exchange for Capital Stock—Where the locator of certain mining claims on which no discovery of mineral had been made transferred the claims to a corporation in exchange for the paid-up capital stock of the corporation, the locator having acquired no right to the claims could convey none to the corporation, and having transferred nothing of value to the corporation in exchange for the capital stock received by him, he was liable for the debts of the corporation to the amount of the value at which said claims were received by the corporation.—*Buck v. Jones*, 250.

Contracts—Lease—Accord and Satisfaction—Option—Defendant being indebted to plaintiff executed to him a lease on a mine for three months with an option to continue for six months. Plaintiff agreed to apply the royalties coming to defendant as they became due on the indebtedness until the debt should be fully paid and agreed to accept that method of payment of all of defendant's liability. Plaintiff operated the mine for three months and credited the royalties as agreed, but they were insufficient to pay the defendant's debt. Held, that the contract of lease was not an accord and satisfaction of the defendant's debt, but that at its termination the plaintiff might sue for the unpaid balance and he was not required to exercise his option of working the mine three months longer before he could bring his action.—*The Boston Newmarket Gold Mining Co. v. Orme*, 359.

Adverse Suit—View of Premises—In an adverse suit to determine the right to a mining claim where the plaintiff's claim was put in issue by the pleading and he introduced no evidence what-

MINES AND MINING—Continued.

ever in support of his claim, he was not entitled to demand a view of the premises by the jury as provided in section 188a, Mills' Ann. Code, and a denial of such demand by the trial court was not error.—*Connolly v. Hughes et al.*, 372.

Lease—Assignment—Consideration—Where a mining lease for a certain term was assigned, the assignee agreeing to work the mine and to pay the consideration out of the net proceeds, he was not required to work the mine continuously through the entire term of the lease at a loss, or else become absolutely liable for the amount of the consideration, but his obligation was fulfilled when he worked the mine sufficiently to show that it could not be worked at a profit. And where the assignment contained no provision against subletting, the assignee by reassigning the lease did not violate his contract nor put it out of his power to comply with it so as to make him absolutely liable for the amount of the consideration.—*Caley v. Portland et al.*, 390.

MINING CLAIMS: See **MINES AND MINING.**

MORTGAGES:

Fire Insurance—Mortgage Clause—Appraisement—Rights of Mortgagee—Pleading—A policy of fire insurance containing the union mortgage clause was issued on a building covered by a deed of trust and was assigned as collateral security to the trustee as additional security to the mortgage debt. The policy also provided that in case of loss or damage the value should be ascertained or estimated by the insured and the insurance company. In an action on the policy by the trustee for the loss caused by the destruction of the building by fire, the plaintiff was not bound by an agreement between the company and the insured as to the amount of the loss, and a demurrer was properly sustained to an answer setting up such agreement at a less sum than the face of the policy and making tender of such agreed sum.—*The Scottish Union and National Ins. Co. v. Field*, 68.

Tax Sales—Redemption—Mandamus—Equity—Parties—Where land covered by a deed of trust was sold for taxes part of which were assessed against the land and part of which were assessed as personal tax of the owner, in a proper proceeding the beneficiary of the trust deed is entitled to a release as to his interest in the land from the tax sale by payment only of the amount properly chargeable against the land, but mandamus will not lie against the county treasurer to compel him to release said

MORTGAGES—Continued.

land from the tax sale except upon payment of the entire amount for which it was sold with interest and penalties. The proper remedy would be a proceeding in equity against the holder of the certificate of purchase.—*Statton v. The People*, 85.

Wrongful Sale by Mortgagee—Measure of Damage—Conflicting Instructions—In an action for damage for a wrongful sale of land by defendant which plaintiff had mortgaged to defendant by a deed absolute in form and for refusing to permit plaintiff to redeem, where the court in one section of its instructions told the jury that the measure of damage was the difference between the sum of the liens on the land and the amount for which it was sold by defendant, provided it was not sold for less than its market value, and in another section that the measure was the difference between the market value at the time of sale and the price for which it was sold by defendant, and in another section that plaintiff was entitled to recover the entire purchase price with interest, and it does not appear which rule the jury adopted, even if any one of the rules laid down for the measure of damage was correct, the instructions are so conflicting that a verdict and judgment based thereon should be reversed.—*Arnett v. Huggins*, 115.

Same—In an action for damage for a wrongful sale by defendant of land held by him under a deed from plaintiff absolute in form but in fact a mortgage, and for refusing to allow plaintiff to redeem, where the answer tendered other issues and there was evidence tending to support them, it was error to instruct the jury that the only question before it was the measure of damage.—*Ib.*

Foreclosure—Parties—Where the grantor in a deed of trust has disposed of all his interest in the premises covered by the deed of trust, he is not a necessary party to an action to foreclose such deed of trust where no personal judgment is sought against him.—*DeCunto, Barra & Co. v. Johnson*, 220.

Foreclosure—Sheriff's Deed—Order of Court Approving Sale—A sheriff's deed made in pursuance of the certificate of sale on the foreclosure of a mortgage is not void because no order of court approving the sale was made prior to the execution of the deed.—*Ib.*

Contracts—Deeds—Assumption of Encumbrance of Grantee—Plaintiff and J. exchanged real estate. At the request of a real estate agent who acted for J. the deed was made by plaintiff to defendant and contained a clause whereby the grantee assumed

MORTGAGES—Continued.

the payment of a mortgage encumbrance thereon. Defendant had no interest in the transaction and her name was inserted as grantee without her knowledge or consent. The real estate agent placed the deed on record and notified defendant of the use of her name as grantee but said nothing about the assumption of the mortgage. Afterwards the real estate agent prepared a deed which defendant executed conveying the land to another party. The mortgage was foreclosed and failing to sell for enough to pay the mortgage plaintiff was compelled to pay the balance. Held, that defendant was not liable on the agreement in the deed to assume the mortgage and plaintiff could not recover in an action against defendant for the amount he was compelled to pay.—*Gill v. Robertson*, 313.

Fraudulent Conveyance—Husband and Wife—Notice—A conveyance of real estate by a husband to his wife in settlement of a bona fide debt owing by him to her is good as against a prior unrecorded mortgage executed by the husband to the same property, where the wife accepted the conveyance in good faith and without notice or knowledge of facts sufficient to charge her with notice of the mortgage.—*Kyle v. Shore et al.*, 355.

Deeds of Trust—Unauthorized Foreclosure—Negotiable Instrument—Where the trustee in a deed of trust without a request or authority from the holder of the note secured thereby foreclosed the deed of trust, his deed conveyed no title and could not be used as an obstruction to a proceeding for foreclosure by the owner of the note whether or not the note was negotiable.—*The Mosca Milling and Elevator Co. v. Murto*, 437.

Same—Action to Set Aside Trustee's Deed—Fraud—Burden of Proof—In an action by the holder of a note secured by a deed of trust to set aside a trustee's deed on the ground that the foreclosure by the trustee was without authority and fraudulent, and asking for foreclosure of the deed of trust, the burden of proof is upon the plaintiff to show the invalidity of the foreclosure sale.—*Ib.*

Deeds of Trust—Foreclosure—Recitals in Trustee's Deed—Prima Facie Evidence—Where a deed of trust provided that in case of foreclosure by the trustee the recitals in the trustee's deed should be prima facie evidence of the facts therein stated, a trustee's deed thereunder reciting that application for foreclosure had been made by the legal holder of the note was prima facie evidence that such application had been made, and in an action by the holder of the note to set aside the trustee's deed on

MORTGAGES—Continued.

the ground that no application was made for the foreclosure, it was error to refuse to allow defendant to introduce said trustee's deed in evidence until he had shown by other evidence the authority of the trustee to act.—Ib.

Deeds of Trust—Foreclosure—Application of Purchase Money—Where a deed of trust provided that in case of foreclosure the purchaser should not be required to see to the application of the purchase money, payment to the trustee by the purchaser at a foreclosure sale was sufficient and he was not required to prove that the money was paid to the holder of the note to establish the validity of the trustee's deed.—Ib.

NEGLIGENCE:

Cities and Towns—Public Streets—Where a fireplug, very near the beaten roadway of a street and at a point in the roadway where vehicles could not pass without one turning out of the beaten way, was permitted to become concealed by growing weeds and vegetation, and the city had knowledge of the condition which rendered the fireplug dangerous to travelers on the street, the city was guilty of negligence in permitting vegetation to conceal the plug and is liable for injuries to a person caused by his vehicle coming in collision with said fireplug without any negligence on his own part while driving along the street.—Thunborg v. The City of Pueblo, 80.

Same — Contributory Negligence — Instructions—In an action against a city for injuries to plaintiff caused by his vehicle while driving along a public street coming in contact with a concealed and dangerous fireplug, where defendant claimed that the injury was the result of plaintiff's own negligence in driving along the street at a furious and unlawful rate of speed, an instruction that if the jury found from the evidence that plaintiff was traveling at a furious and rapid rate of speed and that such act was the cause of the injury it was immaterial whether such traveling was intentional or the result of his inability to restrain his horse he was guilty of contributory negligence and could not recover, was erroneous.—Ib.

Electricity—Defective Wiring—County Jail—Injury to Prisoner by Fire—Pleading—Where a prisoner in a county jail was suffocated and killed by the burning of the jail, in an action against an electric light company a complaint which alleged that the company placed wires in the building and transmitted a current of electricity over them for the purpose of lighting the building,

NEGLIGENCE—Continued.

that the wires were negligently and unskillfully placed, reciting the facts upon which said charge of negligence was based, and that by reason of said negligence the building was set on fire and burned, causing the death of plaintiff's decedent, stated a cause of action against said company.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

Same—Duty of County Commissioners—Notice—Pleading—In an action against the individual commissioners of a county for the wrongful death of a prisoner in a county jail caused by the burning of the jail, based on the failure of said commissioners to personally examine said jail, a complaint which fails to allege that said commissioners had knowledge or could by proper examination have had knowledge of the dangerous condition which caused the fire, and fails to allege in what respect the failure to make the examination contributed to cause the fire, is defective.—*Ib.*

County Commissioners—Duty to Examine Jail—Injury to Prisoner by Fire—Liability of Commissioners—Section 2523, Mills' Ann. Stats., requiring county commissioners to make personal examination of the county jail, its sufficiency and management at each session of the board and to correct all irregularities and improprieties therein found, imposes a public official duty and the commissioners are not individually liable thereunder to an action for damages for the death of a prisoner caused by the burning of the county jail, alleged to have been caused by their negligent failure to make such examination.—*Ib.*

Cities and Towns—Instructions—Defect Cured—In an action against a city an instruction that the city was "bound to use all reasonable care, caution and supervision to keep its streets and sidewalks in safe condition for travel, in the ordinary modes of travel," was not misleading because it failed to qualify the word "safe" with the word "reasonably." But if it was faulty it was cured by a subsequent instruction in which the accurate phraseology was employed.—*The City of Denver v. Murray*, 142.

Cities and Towns—Notice—Instructions—In an action against a city where the undisputed facts showed that the dangerous obstruction of the street complained of had existed for such a length of time that the city was charged by law with notice and with the duty of removing it and it would have been proper to so instruct the jury, the city is not in a position to complain of an instruction given upon the question of notice.—*Ib.*

NEGLIGENCE—Continued.

Cities and Towns—Obstruction of Streets—Instructions—In an action against a city for an injury caused by the falling of a derrick where the undisputed evidence showed that the derrick stood in the street in close proximity to a schoolhouse and was attractive to the school children, who were in the habit of playing upon it, it was not erroneous for the court to refer to the derrick as "said obstruction."—*Ib.*

Same—In an action against a city for injuries to a child caused by the falling of a derrick which had been left standing in the street in close proximity to a school which was attended by plaintiff for at least a year, and which was attractive to the children to play upon, the fact that the derrick was tied to a stump by a rope which was liable at any time to be severed accidentally or heedlessly by the children playing upon it did not palliate the negligence of the city in failing to have it removed, and it was not error for the court to instruct the jury that it was immaterial whether or not it was tied.—*Ib.*

Master and Servant—Safe Appliances—It is the duty of a master to exercise reasonable care in providing the servant proper machinery and appliances and in fit condition for use, for the performance of the work required of him, but where the master has provided upon the premises and within reach of his servant suitable appliances, he is not liable for injuries to the servant caused by his failure to use the appliances furnished—*Floyd v. The Colorado Fuel and Iron Co.*, 153.

Same — Fellow Servant — Assumption of Risk —Plaintiff had charge of the cupolas of the converting department of defendant's iron works. D. had charge of the machinery of the same department. Each had men under him but neither was under or subject to the order of the other, both being subject to orders of the superintendent. The superintendent ordered plaintiff to take his men and replace a runner that had burned out with a new one, and was told by plaintiff that it could not safely be done without a block and fall, whereupon the superintendent said he would send D. with the block and fall, and directed plaintiff to assist him in replacing the runner. Shortly afterwards D. appeared without the block and fall, and upon being asked by plaintiff where it was, answered that it was down in the engine room, but that he was in a hurry and had not time to get it, and directed plaintiff to proceed without it. In attempting to replace the runner without the block and fall, plaintiff was injured. Held, that plaintiff took his own chances in following the directions of

NEGLIGENCE—Continued.

D. and voluntarily assumed the risk of injury incident to the attempt to replace the runner without the block and fall, and defendant was not liable for such injury.—*Ib.*

Fellow Servants—Defendant was the owner of a mine and mill connected by a tramway used to haul the ore from the mine to the mill. The mill was only used to crush ore from defendant's mine, and the mine and mill were operated as one enterprise. Held, that plaintiff, the superintendent of the mill, whose duty it was to operate it, and the employees at the mine who handled the ore, were fellow servants, and an injury to plaintiff caused by a sledge hammer being negligently mingled with the ore at the mine and shipped to and fed into the mill was the result of the negligence of a fellow servant for which defendant was not liable.—*Molique v. The Iowa Gold Mining and Milling Co.*, 223.

Master and Servant—Assumption of Risk—An employee assumes all the risks incident to his service which arise from defects or imperfections in the thing about which he is employed of which he had knowledge or means of knowledge equal to that of his employer.—*Harvey v. The Mountain Pride Gold Mining Co.*, 234.

Same—Mines and Mining—The workings of defendant's mine consisted of a tunnel connecting with a shaft so that a draft of air passed into the tunnel and out at the shaft. A bunk house was situated at the mouth of the tunnel consisting of a small building on each side, the space between being roofed over and forming the entrance to the tunnel. No special means were provided for extinguishing or checking fire. A fire occurred in the bunk house and was communicated to the timbers in the tunnel and caused the death of plaintiff's husband who was at work in the shaft. Deceased had experience in the work about mines and had been in defendant's employ one month sleeping in the bunk house, and never made any complaint as to the dangerous condition of the mine, and defendant had made no promise in reference thereto. Held, that deceased assumed the risk arising from the location of the bunk house at the mouth of the tunnel and plaintiff was not entitled to recover from defendant damages for the death of her husband.—*Ib.*

Master and Servant—Safe Place to Work—Delegation of Duty—Vice-Principal—The master is bound to use reasonable care in providing for the safety of his servants. It is his duty to furnish safe and suitable appliances and keep them in proper condition for use. Knowledge of defects in the appliances to which danger

NEGLIGENCE—Continued.

is incident, is imputed to him if by the exercise of reasonable diligence he might have discovered and remedied them. And he cannot escape liability for neglect of his duty by delegating its performance to an employee. By the delegation the employee, without regard to his rank or the grade of his employment, becomes a representative of the master, and his negligence is the master's negligence. But this rule does not apply to appliances which are not furnished by the master and which the law does not charge him with the duty of providing.—*McKean v. The Colo. Fuel & Iron Co.*, 285.

Same—Plaintiff was an employee of defendant working in the second story of defendant's engineroom. A safe passageway or balcony was constructed entirely around the room of said second story, but a part of the floor of said passageway had been removed for the purpose of letting certain machinery pass through. For convenience in passing from one side to the other of this opening and to save the trouble of walking around the room, some of defendant's employees placed a plank across the opening in the floor on which the employees were in the habit of crossing. Plaintiff in attempting to cross on said plank fell and was injured. Held, that plaintiff took upon himself the risk of crossing on said plank and defendant was not liable. And the fact that the foreman under whose direction plaintiff was working but who had nothing to do with the construction of the passageway had crossed on the plank and called to other employees to come on immediately before plaintiff attempted to cross, did not relieve plaintiff of the duty to use the passageway constructed by defendant for his use nor charge defendant with responsibility for the danger connected with the use of the plank.—*Ib.*

Invisible Danger—Duty of Employer to Warn Employee—Where an employer inducts an employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, it is the duty of the employer to impart to the employee his own knowledge of the situation, and his failure to do so would be negligence which would render the employer liable for an injury to the employee resulting from such invisible danger.—*Holshouser v. The Denver Gas and Electric Co.*, 431.

Same—Striking Employees—Where an employer employed an employee knowing that such employee was in danger of being injured by striking employees and the employee had no knowl-

NEGLIGENCE—Continued.

edge of such danger, and the employer failed to warn him of the danger, the employer is liable for an injury to such employee by the striking employees.—Ib.

Railroads—Crowded Condition of Car—Pleading—Evidence—In an action against a railroad company for injuries to a passenger caused by the door of the car shutting and mashing plaintiff's finger while he was riding upon the platform, an allegation that the car was crowded so that there was no room for plaintiff on the inside was proper as explanatory of why plaintiff was riding upon the platform and for the purpose of removing the presumption of contributory negligence, and evidence was admissible in support of such allegation. And an allegation and proof in support thereof of the crowded condition of the platform was proper as explanatory of why plaintiff was riding in the position he was with reference to the door.—*Trumbull v. Donahue*, 460.

Railroads—Injury to Passenger—Evidence—In an action against a railroad company for injuries to a passenger caused by a brakeman shutting the door of the car upon plaintiff's finger, the testimony of other passengers who were at the time riding with plaintiff upon the platform that they saw the position of plaintiff's hand at the time was admissible in corroboration of plaintiff's testimony as to his position on the platform.—Ib.

Same—Admissions—In an action against a railroad company for injuries caused by a brakeman shutting the door of the car upon plaintiff's finger, upon the issue as to whether or not the brakeman actually knew of the dangerous position of plaintiff's hand, statements and admissions of the brakeman made immediately after the mashing of plaintiff's finger were admissible as part of the *res gestae* to contradict the brakeman's testimony that he did not observe plaintiff's position at the time.—Ib.

Damages—Interest—Instructions—In an action for damages for personal injury where the prayer of the complaint asked for interest upon the damages to be assessed, it was not prejudicial error to refuse a requested instruction by defendant that no interest could be allowed where the instructions given upon the measure of damage confined the jury to an ascertainment of the actual damage sustained and left no room for an allowance of interest.—Ib.

Master and Servant—Safe Appliances—If a master has furnished his servant with proper machinery and appliances for

NEGLIGENCE—Continued.

the performance of the work required of the servant, it is no part of the master's duty to see that the servant makes use of such machinery and appliances so furnished.—*Kellogg v. The Denver City Tramway Co.*, 475.

Same—Repairing—Where a servant is employed to put a thing or place in a safe and suitable condition for use, it is not the master's duty to have such place or thing in safe condition and good repair for the purpose of such employment.—*Ib.*

Same—Electric Railways—Linemen—An electric railway company who employed a lineman whose duty it was to repair its poles and wires and to go upon the poles for the purpose of taking down and putting up wires did not owe to such employee the duty to inspect its poles and inform him whether or not any of them were so decayed as to be unsafe to work upon.—*Ib.*

Same—Plaintiff was employed by defendant, an electric railway company, as a lineman. Plaintiff had been engaged in the business of lineman and electric work several years and had been at work for defendant for three months. Plaintiff was supplied with proper appliances for bracing and strengthening poles which he might be required to climb. Held, that defendant was not liable for an injury to plaintiff caused by a pole which had rotted at the ground breaking and falling while plaintiff was upon it for the purpose of repairing the wires, and which plaintiff had neglected to brace or prop before going upon it.—*Ib.*

Street Railways—Appliance—Evidence—In an action against a street railway company for running its car over and causing the death of a child, where there was nothing in the testimony tending to prove that the car was not properly equipped, nor that other appliances than those in use were better or safer, nor that any law or ordinance required the use of a fender at the time of the accident, it was not error to refuse to allow a witness to answer the question: "There was no fender like they have now?"—*Zimmerman et al. v. The Denver Consolidated Tramway Co.*, 480.

Instructions—Evidence—In an action against a street railway company for running its car over and killing a child, the court properly refused to submit to the jury the question of defendant's negligence in failing to provide the car with suitable contrivances for avoiding accidents of the kind, where there was no evidence upon which to predicate such instructions.—*Ib.*

Electric Railways—Safe Appliances—The question as to whether or not a street railway company was negligent in fail-

NEGLIGENCE—Continued.

ing to supply its car with proper appliances to avoid accidents must be determined by the character of appliances in use at the time of the accident in question without regard to what was subsequently done in adding other appliances.—*Ib.*

Instructions—Measure of Damages—Harmless Error—In an action for damages for personal injuries alleged to have been caused by defendant's negligence where the verdict of the jury is for the defendant, errors committed in instructions upon the question of the measure of damage are not prejudicial and will not justify a reversal.—*Ib.*

NEGOTIABLE INSTRUMENTS: See **BILLS AND NOTES.**

NEW TRIALS:

Appellate Practice—Waiver—Under particular circumstances an order granting a new trial may be the subject of review, but to give the complaining party any standing in the appellate court he must abandon his case at that point. By participating in the new trial he acquiesces in the order granting it, and waives any right he may have had to question the correctness of the ruling.—*Geraghty v. Randall*, 195.

Partnership—Accounting—New Evidence—In an action by one partner against another for an accounting, a new trial will not be granted on the ground of newly discovered evidence where the fact for which the new trial is asked is that the partner in whose favor judgment was rendered has since the trial sold certain of the partnership property.—*Johnson v. Johnson*, 493.

Appellate Practice—Bill of Exceptions—Motion for New Trial—An assignment of error based on a refusal to grant a new trial will not be considered unless the motion for new trial is made part of the record by bill of exceptions.—*Rudolph v. Smith*, 496.

NOTICE:

Water Rights—Easements—Where one has an easement in a ditch through the lands of another based on an oral contract and had been in open visible use of the ditch for irrigation purposes for several years up to the time the land was sold without any exception of the easement, the purchaser took the land charged with notice of the easement and subject thereto.—*Croke v. The American National Bank*, 3.

Duty of County Commissioners—Pleading—In an action against the individual commissioners of a county for the wrongful death of a prisoner in a county jail caused by the burning of the jail, based on the failure of said commissioners to personally examine

NOTICE—Continued.

said jail, a complaint which fails to allege that said commissioners had knowledge or could by proper examination have had knowledge of the dangerous condition which caused the fire, and fails to allege in what respect the failure to make the examination contributed to cause the fire, is defective.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

Cities and Towns—Negligence—Instructions—In an action against a city where the undisputed facts showed that the dangerous obstruction of the street complained of had existed for such a length of time that the city was charged by law with notice and with the duty of removing it and it would have been proper to so instruct the jury, the city is not in a position to complain of an instruction given upon the question of notice.—*The City of Denver v. Murray*, 142.

Corporations—Powers of Agent—Bills and Notes—The fact that the manager of a corporation who executed an unauthorized promissory note of the corporation was also a director would not charge the corporation with notice of the unauthorized act.—*The Sanford Cattle Co. v. Williams*, 378.

OPTIONS: See **CONTRACTS**.

PARTIES:

Judgments—Mechanics' Liens—In an action for a personal judgment against the owner and to enforce a mechanic's lien on real estate where plaintiffs claimed under a contract originally made with a contractor under defendant, but which defendant assumed and made his own contract before plaintiffs commenced work thereunder, and in which action said contractor was joined as a party defendant, the fact that no final disposition was made of the case as to said contractor would not affect the validity of a personal judgment against the owner or a lien decreed upon the real estate.—*Harris et al. v. Harris*, 34.

Mortgages—Foreclosure—Where the grantor in a deed of trust has disposed of all his interest in the premises covered by the deed of trust, he is not a necessary party to an action to foreclose such deed of trust where no personal judgment is sought against him.—*De Cunto, Barra & Co. v. Johnson*, 220.

Corporations—Ultra Vires—Injunction—Suit by Stockholder—A stockholder of a corporation cannot maintain an action to enjoin the foreclosure of a deed of trust to corporate property executed by the president and secretary of the corporation, on the ground that it was executed without authority and for the private benefit

PARTIES—Continued.

of the president, without first showing that proper effort had been made to have the action brought by the corporation and that the officers of the corporation had refused to bring the action, and that he had also exhausted all reasonable efforts to obtain relief through the stockholders as a body or that such efforts would be unavailing.—*Smith v. Bulkley et al.*, 227.

Same—Where a corporation was enjoined from bringing any action to prevent a foreclosure sale under a deed of trust to corporate property, the injunction was binding on the stockholders and prevented them from bringing any such action.—*Ib.*

Divorce and Alimony—Ne Exeat Bond—Action Upon Bond—Where in a suit for divorce and alimony by a wife against her husband a writ of ne exeat was issued against the defendant and he entered into bond, payable to the people, conditioned that he would not leave the jurisdiction of the court without leave of the court, an action upon the bond for breach of its condition was properly brought in the name of the people for the use and benefit of the wife.—*Marsellis v. The People for the use of Isabella M. Butter*, 258.

Evidence—Discrediting Witness—Record—The record of a proceeding to remove an administrator finding that through the negligence of the administrator and the fraud of his agent the estate had been defrauded, to which proceeding the agent was not a party, is not admissible in evidence in another cause in which said agent is a witness for the purpose of discrediting his testimony.—*Tourtelotte v. Brown*, 335.

Same—Estates of Decedents—In an action against an administrator a conversation between the administrator and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent is not prohibited from admission in evidence by section 4816, *Mills' Ann. Stats.*—*Ib.*

Corporations—Action by Stockholders—Pleading—An action cannot be maintained by stockholders of a corporation upon a cause of action which was a direct wrong to the corporation itself, unless it affirmatively appears that plaintiffs have made proper effort to induce the directors of the corporation to bring suit in the name of the corporation and that the directors have failed or refused to do so, and also that plaintiffs have exhausted all means within their reach to obtain redress through the stockholders of the corporation, or unless a state of facts be

PARTIES—Continued.

shown which makes it apparent that such effort to induce action by the directors or to obtain relief through the stockholders would be futile.—*Ide et al. v. Bascomb et al.*, 415.

Pleading—Misjoinder—Demurrer—Waiver—A failure to demur to a complaint on the ground of misjoinder of parties waives the objection.—*Johnson et al. v. Bott*, 469.

Pleading—Joint Judgment—Harmless Error—Where a complaint stated a separate cause of action against each of two defendants, and the cause was proven as to each, the fact that a joint judgment was rendered against the two was not prejudicial error.—*Ib.*

PARTNERSHIP:

Principal and Agent—Power of Attorney—A general power of attorney authorizing an agent to enter into possession of, control, sell and assign all real estate and other property belonging to the principal, does not empower the agent to enter into a copartnership agreement for his principal with any one.—*Guy v. Rosewater*, 1.

Bills and Notes—Action Upon—Defense—In an action upon a promissory note payable to E. & E., where it was alleged that E. & E. was a copartnership firm and that plaintiffs were the partners, an answer which denied that plaintiffs composed the firm of E. & E. to whom the note was payable and denied their ownership and alleged that one S. E. was the sole member of the firm of E. & E. to whom the note was payable and was then the owner thereof, and which alleged a defense which would be good as against S. E. but which would not be good as against plaintiffs, stated a sufficient defense to the action.—*Engel et al. v. Atkinson et al.*, 267.

Accounting—New Trial—New Evidence—In an action by one partner against another for an accounting, a new trial will not be granted on the ground of newly discovered evidence where the fact for which the new trial is asked is that the partner in whose favor judgment was rendered has since the trial sold certain of the partnership property.—*Johnson v. Johnson*, 493.

Accounting—Evidence—Harmless Error—In an action for an accounting between two partners where a vast number of exhibits were introduced before the referee by both parties, the judgment of the court will not be reversed for refusing to strike out certain exhibits, even though they were incompetent, where the findings of the referee were warranted by other documentary and oral testimony introduced at the hearing.—*Ib.*

PLEADING:

Contracts—Principal and Subcontractors—A complaint which alleges that plaintiffs made an agreement with the contractor who was constructing a building for defendant to furnish the material and plaster the building for a certain price, and that before they commenced work defendant agreed with plaintiffs that if they would do said plastering and furnish material therefor, he would pay plaintiffs the sum agreed on by plaintiffs and the contractor, states a cause of action against defendant as owner and in favor of plaintiffs as principal contractors.—*Harris et al. v. Harris*, 34.

Claim Against County—Assistant District Attorney—Amendment—Departure—Where counsel was appointed to assist the district attorney to prosecute a criminal case and brought an action against the county to recover compensation for his services and alleged in his original complaint that he was appointed and acted as "special prosecutor" in the case mentioned, an amendment by interlineation by striking out the words "special prosecutor" wherever they occurred and inserting instead "to assist the district attorney" was not a departure from the original cause of action.—*The Board of County Commissioners of Hinsdale County v. Crump*, 59.

Mandamus—Cities and Towns—Appropriation—A petition for a writ of mandamus to compel the board of trustees of an incorporated town to allow a claim of the petitioner against the town for coal furnished to the town and to order a warrant drawn for its payment which fails to allege that a previous appropriation had been made concerning such expense is fatally defective.—*The Board of Trustees of the Town of Montrose v. Endner*, 65.

Fire Insurance — Mortgage Clause—Appraisement — Rights of Mortgagee—A policy of fire insurance containing the union mortgage clause was issued on a building covered by a deed of trust and was assigned as collateral security to the trustee as additional security to the mortgage debt. The policy also provided that in case of loss or damage the value should be ascertained or estimated by the insured and the insurance company. In an action on the policy by the trustee for the loss caused by the destruction of the building by fire, the plaintiff was not bound by an agreement between the company and the insured as to the amount of the loss, and a demurrer was properly sustained to an answer setting up such agreement at a less sum than the

PLEADING—Continued.

face of the policy and making tender of such agreed sum.—*The Scottish Union and National Insurance Co. v. Field*, 68.

Quieting Title—Judgment on Pleading—In an action to quiet title to an undivided three-fourths interest in a mining claim where the complaint disclosed the estate claimed by plaintiffs and the title by which the same was held, and one of the defendants answered alleging title to an undivided one-tenth interest in the claim and from the answer it appeared that defendant deraigned title from the same source that plaintiffs deraigned title to part of their claim, and from the pleadings it appeared that the interests claimed by plaintiffs and defendant from a common source was in excess of the interest owned by their common grantor, the claim of defendant was to the extent of such excess adverse to plaintiffs' interest and it was error to strike out defendant's answer and enter judgment for plaintiffs on the pleading.—*Colburn v. Dortic et al.*, 96.

Mining Claims—Filing Adverse—Presumption—In an adverse suit where the complaint alleged the filing of the adverse in the United States land office it will be presumed that it was filed within the time prescribed by the United States statutes for such filing.—*The Pennsylvania Mining Co. of Colorado v. Bales*, 108.

Same—Waiver—In an adverse suit if the defendant desires to raise the question that the adverse was not filed in the United States land office within sixty days after publication or that the adverse suit was not filed within thirty days from the filing of the adverse in the land office, he must raise such question either by demurrer or answer, and if he goes to trial without having done so he waives the objections.—*Ib.*

Adverse Suits—Time of Filing—Where the file marks on a complaint in an adverse suit show that it was filed within thirty days from the filing of adverse in the land office it was not necessary to allege in the complaint that it was filed within said time.—*Ib.*

Practice—Insufficient Denial—Waiver—Where the denial in an answer was, in form, "denies each and every other material allegation," an objection to its sufficiency after plaintiff has introduced his evidence in support of the allegations intended to be put in issue by the denial and when defendant offered to introduce his evidence, came too late, and the insufficiency was waived.—*Appelman v. The Broadway Insurance Co.*, 110.

Negligence—Electricity—Defective Wiring—County Jail—Injury to Prisoner by Fire—Where a prisoner in a county jail

PLEADING—Continued.

was suffocated and killed by the burning of the jail, in an action against an electric light company a complaint which alleged that the company placed wires in the building and transmitted a current of electricity over them for the purpose of lighting the building, that the wires were negligently and unskillfully placed, reciting the facts upon which said charge of negligence was based, and that by reason of said negligence the building was set on fire and burned, causing the death of plaintiff's decedent, stated a cause of action against said company.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

Same—Duty of County Commissioners—Notice—In an action against the individual commissioners of a county for the wrongful death of a prisoner in a county jail caused by the burning of the jail, based on the failure of said commissioners to personally examine said jail, a complaint which fails to allege that said commissioners had knowledge or could by proper examination have had knowledge of the dangerous condition which caused the fire, and fails to allege in what respect the failure to make the examination contributed to cause the fire, is defective.—*Ib.*

Banks—Liability of Stockholders—In an action against a stockholder of an insolvent banking corporation to enforce his individual liability for a debt of the bank, the complaint must allege the number of shares of stock issued by the insolvent corporation, the number held by the respective stockholders, the amount of the debts of the bank for which the stockholders are liable, together with the dates when created; and a complaint which failed to allege these facts was insufficient to support a judgment, and a demurrer thereto was properly sustained.—*Richardson v. Boot*, 140.

Bills and Notes — Misnomer — Variance — Evidence—Where a complaint on a promissory note set out a copy of the note in which the payor's name was spelled "Colin," whereas the name on the note was "Collin," the difference in the spelling was not a material variance and the note was properly admitted in evidence.—*Collin v. The Farmers' Alliance Mutual Fire Insurance Co.*, 170.

Practice—Counterclaim—Dismissal—Where a complaint alleged two causes of action and defendant set up a counterclaim which was general and applied equally to both causes of action and could have been disposed of at the trial of the first cause, it was not error to permit plaintiff to dismiss the second cause.—*Ib.*

PLEADING—Continued.

Contracts—Statute of Frauds—Promise to Pay Debt of Another—In an action upon an oral contract the defense that it was an agreement to answer for the debt of another and void under the statute of frauds because not in writing is not available to defendant unless the statute be pleaded.—*The Cerrusite Mining Co. v. Steele*, 216.

Cities and Towns—Sewers—Invalid Ordinance—Evidence—In an action by a sewer company against an inhabitant of a town to recover compensation for the use of its sewer system, where plaintiff's ownership was denied and plaintiff relied upon an ordinance as the source of its title, defendant could avail himself of the invalidity of the ordinance in defense without having specially pleaded the same.—*Weaver et al. v. The Canon Sewer Co.*, 242.

Ne Exeat Bond—Action Upon—Demurrer—In an action upon a ne exeat bond an objection to the complaint that it does not definitely appear whether the principal in the bond left the jurisdiction before or after judgment was recovered against him in the action in which the writ of ne exeat was issued should be raised by motion and not by demurrer.—*Marsellis v. The People for the use of Isabella M. Butter*, 258.

Bills and Notes—Action Upon—Defense—Partnership—In an action upon a promissory note payable to E. & E., where it was alleged that E. & E. was a copartnership firm and that plaintiffs were the partners, an answer which denied that plaintiffs composed the firm of E. & E. to whom the note was payable and denied their ownership and alleged that one S. E. was the sole member of the firm of E. & E. to whom the note was payable and was then the owner thereof, and which alleged a defense which would be good as against S. E. but which would not be good as against plaintiffs, stated a sufficient defense to the action.—*Engel et al. v. Atkinson et al.*, 267.

Accident Insurance—Visits of Physician—Where an accident insurance policy promised to pay the insured a certain sum per week from the first to the last visit of the attending physician, a complaint which alleged that insured became sick on a certain day and was under the care of a physician until a certain other day named was sufficient to admit proof of the dates of the physician's visits although plaintiff might have been required on motion to make his complaint more definite, and the fact that some of the visits took place at the physician's office instead of

PLEADING—Continued.

the plaintiff's home was immaterial.—*The Mutual Benefit Association v. Nancarrow*, 274.

Accident Insurance—Notice—Where a complaint on a policy of accident insurance on its face showed that a liability existed against defendant in favor of plaintiff, and the complaint contained no averment of a condition of the policy prescribing the notice to be given to the defendant of the sickness of the insured or of a compliance with such condition, if the defendant desires to rely upon a breach of such condition to escape liability, it must plead the condition.—*Ib*

Bills and Notes—Endorsement—Delivery—In an action on a negotiable promissory note by an endorsee an allegation that the payee "endorsed and transferred" the note to plaintiff was a sufficient allegation of delivery.—*The Louisville Coal Mining Co. v. The International Trust Co.*, 345.

Same—In an action upon a negotiable promissory note by an endorsee an allegation that the payee endorsed the note to plaintiff implies a delivery and it is unnecessary to specifically allege a delivery.—*Ib*.

Sufficiency of Complaint—Demurrer—If a complaint states facts sufficient to entitle plaintiff to recover in any sum, it is good as against a general demurrer although it may not state a cause of action for the full amount claimed.—*Ingham v. Ryan*, 347.

Estoppel—Replevin—In an action of replevin by the owner to recover property levied on and held under executions against other parties, a defense that plaintiff is estopped to assert ownership of the property as against the execution creditors because the execution defendants were permitted to hold themselves out as owners so as to justify said creditors in believing that they were the owners, cannot be relied on unless it is pleaded.—*A. Leschen & Sons Rope Co. v. Craig et al.*, 353.

Contracts — Rescission — Fraud — Appellate Practice — In an action to rescind a contract for the purchase of land and to recover back the purchase price placed in escrow where the sole ground for the rescission alleged in the complaint was the fraudulent representations of the seller, and the cause was tried upon that theory, the appellate court will not consider an argument based on the point that the contract being verbal and executory could be rescinded by either party at his pleasure and as a matter of right.—*Muir v. Pratt et al.*, 363.

Certificate of Indebtedness—Interest—A written certificate of indebtedness will draw interest at eight per cent. per annum. In

PLEADING—Continued.

an action upon such certificate an answer that merely denies that any interest is due or owing on the indebtedness does not put in issue any material allegation of the complaint.—*The Midland Fuel Co. v. Schuessler*, 386.

Attachment—Affidavit—Traverse—In an attachment proceeding the attachment issues are presented by the affidavit in attachment and the traverse thereto. The allegations in the affidavit cannot be put in issue by the answer to the complaint.—*Ib.*

Same—An affidavit in attachment dated December 8, alleging that defendant is about to fraudulently transfer its property to hinder creditors, is not put in issue by a traverse dated December 19, wherein it denies that it is about to do so. Such traverse is not a denial that it was about to fraudulently transfer its property at the time the affidavit was made.—*Ib.*

Same—Amendment—Discretion of Court—Appellate Practice—An application to amend a traverse of an attachment affidavit is addressed to the discretion of the court, and where it does not appear from the record upon what the court acted in denying such application, the appellate court will not review its action thereon.—*Ib.*

Negligence—Railroads—Crowded Condition of Car—Evidence—In an action against a railroad company for injuries to a passenger caused by the door of the car shutting and mashing plaintiff's finger while he was riding upon the platform, an allegation that the car was crowded so that there was no room for plaintiff on the inside was proper as explanatory of why plaintiff was riding upon the platform and for the purpose of removing the presumption of contributory negligence, and evidence was admissible in support of such allegation. And an allegation and proof in support thereof of the crowded condition of the platform was proper as explanatory of why plaintiff was riding in the position he was with reference to the door.—*Trumbull v. Donahue*, 460.

Misjoinder—Demurrer—Waiver—A failure to demur to a complaint on the ground of misjoinder of parties waives the objection.—*Johnson et al. v. Bott*, 469.

Practice—Joint Judgment—Harmless Error—Where a complaint stated a separate cause of action against each of two defendants, and the cause was proven as to each, the fact that a joint judgment was rendered against the two was not prejudicial error.—*Ib.*

Practice—Inconsistent Positions—Election of Counts—Where plaintiff upon motion of defendant was required to elect which of

PLEADING—Continued.

two counts he would proceed upon, and defendant in making his motion and the court in acting thereon conceded that the count elected was upon contract, and throughout the trial the count was treated as upon contract, defendant will not be heard to say upon appeal, in order to secure an affirmance, that the count is in tort.—*Rucker v. The Omaha and Grant Smelting and Refining Co.*, 487.

Attachment—Action Upon Undertaking—Election of Counts—

In an action upon an undertaking in attachment where plaintiff stated in one count a cause of action for the wrongful suing out of the writ and in another a cause of action for malicious prosecution in its issuance, it was error to require plaintiff to elect upon which of the two counts he would proceed.—*Ib.*

Practice—Election of Counts—Waiver—Where a plaintiff was erroneously required to elect as to which one of two counts he would proceed upon, the error was not waived by going to trial upon the count so elected.—*Ib.*

Contracts—In an action upon a written contract the complaint may allege the contract according to its legal effect or by setting it out in *haec verba*.—*Abby v. Dexter*, 498.

Contracts—Demand—In an action upon a contract to pay money an allegation that defendant failed and refused to pay the money is a sufficient allegation of demand, especially in the absence of a demurrer, and where it is apparent from the answer that a demand would have been unavailing.—*Ib.*

POWER OF ATTORNEY:

Principal and Agent—Partnership—A general power of attorney authorizing an agent to enter into possession of, control, sell and assign all real estate and other property belonging to the principal, does not empower the agent to enter into a copartnership agreement for his principal with any one.—*Guy v. Rosewater*, 1.

PRACTICE IN CIVIL ACTIONS:

Judgments — Default — Motion to Set Aside — Meritorious Defense—Excusable Neglect—The mere fact that a defendant had a meritorious defense to an action is not sufficient to set aside a default and judgment against him, but he must show that his neglect in permitting the judgment to be taken against him was excusable.—*Barra v. The People*, 16.

Same—Negotiations of Settlement—A motion to set aside a default and judgment which alleges that the neglect to plead was

PRACTICE IN CIVIL ACTIONS—Continued.

because of negotiations looking toward a settlement, but which fails to allege with whom the negotiations were held and in what they consisted, is insufficient to state a cause of excusable neglect.—Ib.

Same—Forfeited Recognizance—Search for Defendant—The fact that the surety upon a forfeited recognizance was at the time making search for his absconding principal with a view of procuring his presence in court does not excuse his neglect to plead to an action upon the forfeited recognizance and is not a sufficient showing to set aside a default judgment.—Ib.

Summons—Alias—Presumption—The clerk of a court has authority to issue an alias summons without an order of court where the original has been destroyed. Where an alias summons was issued without an order of court and served it will be presumed that the original was destroyed before the issuance of the alias and that the clerk had knowledge of its destruction and issued the alias upon proper application.—Ib.

Summons — Default — Motion to Set Aside — Appearance —A motion to set aside a default judgment on account of excusable neglect was a general appearance and waived the right to question the sufficiency of the summons.—Ib.

Quieting Title—Pleading—Judgment on Pleading—In an action to quiet title to an undivided three-fourths interest in a mining claim where the complaint disclosed the estate claimed by plaintiffs and the title by which the same was held, and one of the defendants answered alleging title to an undivided one-tenth interest in the claim, and from the answer it appeared that defendant deraigned title from the same source that plaintiffs deraigned title to part of their claim, and from the pleadings it appeared that the interests claimed by plaintiffs and defendant from a common source was in excess of the interest owned by their common grantor, the claim of defendant was to the extent of such excess adverse to plaintiffs' interest and it was error to strike out defendant's answer and enter judgment for plaintiffs on the pleading.—Colburn v. Dortic et al., 96.

Mining Claims—Filing Adverse—Pleading—Presumption—In an adverse suit where the complaint alleged the filing of the adverse in the United States land office, it will be presumed that it was filed within the time prescribed by the United States statutes for such filing.—The Pennsylvania Mining Co. of Colorado v. Bales, 108.

PRACTICE IN CIVIL ACTIONS—Continued.

Same—Waiver—In an adverse suit if the defendant desires to raise the question that the adverse was not filed in the United States land office within sixty days after publication or that the adverse suit was not filed within thirty days from the filing of the adverse in the land office, he must raise such question either by demurrer or answer, and if he goes to trial without having done so he waives the objections.—Ib.

Adverse Suits—Time of Filing—Pleading—Where the file marks on a complaint in an adverse suit show that it was filed within thirty days from the filing of adverse in the land office, it was not necessary to allege in the complaint that it was filed within said time.—Ib.

Pleading—Insufficient Denial—Waiver—Where the denial in an answer was, in form, "denies each and every other material allegation," an objection to its sufficiency after plaintiff has introduced his evidence in support of the allegations intended to be put in issue by the denial and when defendant offered to introduce his evidence, came too late, and the insufficiency was waived.—Appelman v. The Broadway Insurance Co., 110.

Bills and Notes—Pleading—Misnomer—Variance—Evidence—Where a complaint on a promissory note set out a copy of the note in which the payor's name was spelled "Colin," whereas the name on the note was "Collin," the difference in the spelling was not a material variance and the note was properly admitted in evidence.—Collin v. The Farmers' Alliance Mutual Fire Insurance Co., 170.

Pleading — Counterclaim — Dismissal — Where a complaint alleged two causes of action and defendant set up a counterclaim which was general and applied equally to both causes of action and could have been disposed of at the trial of the first cause, it was not error to permit plaintiff to dismiss the second cause.—Ib.

Evidence—Motion to Strike Out—Exception—Objection—An exception to a ruling sustaining a motion to strike out certain evidence is unavailing without previous objection to the motion.—Ib.

Evidence—Withdrawal—Objections—Where plaintiff introduced a witness and asked one question and when defendant commenced to cross-examine him, plaintiff by permission of the court withdrew the evidence to which defendant objected but stated no reason for the objection, the objection was insufficient to sustain an exception to the withdrawal.—Ib.

PRACTICE IN CIVIL ACTIONS—Continued.

Appellate Practice—New Trial—Waiver—Under particular circumstances an order granting a new trial may be the subject of review, but to give the complaining party any standing in the appellate court he must abandon his case at that point. By participating in the new trial he acquiesces in the order granting it, and waives any right he may have had to question the correctness of the ruling.—*Geraghty v. Randall*, 195.

Sales—Fraud—Juries—Verdict—Special Finding—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the sale was effected through the false and fraudulent representations of defendant, the jury returned a general verdict for plaintiff, and in answer to a special interrogatory found that defendant was guilty of fraud and wilful deceit. The court sustained the general verdict but set aside the special finding on the ground that it was not sustained by the evidence. Held, that the action of the court was not inconsistent and that its action in setting aside the special finding will not be construed as a ruling that there was no evidence of fraud upon which to base the general verdict, but that there was not sufficient evidence of fraud and wilful deceit to warrant a verdict the effect of which was to authorize execution against the body of defendant.—*Ib.*

Life Insurance—Lapsed Policy—Reinstatement—A policy of life insurance was declared forfeited for failure to pay the premium due, and the insured was reinstated in a policy of a smaller amount which he accepted and paid the premium due. In an action upon the reinstated policy where the company defended on the ground that the policy had been cancelled by the company because of false representations as to health made in the application for reinstatement, a judgment in plaintiff's favor on the sole ground that the first policy had not lapsed for the reason that the company failed to give notice that the premium was due as required in the policy, was rendered upon an issue not in the case, and where there was no finding of the trial court upon the question of the false representations of the insured in his application for reinstatement, which was the only issue in the case, the judgment must be reversed.—*The Denver Life Insurance Co. v. Bucknum*, 209.

Contracts—Statute of Frauds—Promise to Pay Debt of Another—Pleading—In an action upon an oral contract the defense that it was an agreement to answer for the debt of another and void under the statute of frauds because not in writing is not avail-

PRACTICE IN CIVIL ACTIONS—Continued.

able to defendant unless the statute be pleaded.—*The Cerrusite Mining Co. v. Steele*, 216.

Evidence—Former Trial—Stenographer's Notes—The notes of the official stenographer of the county court, of the evidence of a witness, are not admissible in the trial of the same cause in the district court to prove the testimony of such witness in the absence of a stipulation to that effect.—*Ib.*

Cities and Towns—Sewers—Invalid Ordinance—Pleading—Evidence—In an action by a sewer company against an inhabitant of a town to recover compensation for the use of its sewer system, where plaintiff's ownership was denied and plaintiff relied upon an ordinance as the source of its title, defendant could avail himself of the invalidity of the ordinance in defense without having specially pleaded the same.—*Weaver et al. v. The Canon Sewer Co.*, 242.

Appeal from County to District Court—Defective Appeal Bond—New Bond—Where an appeal was prayed from the county to the district court by two joint defendants in a cause of which the district court had original jurisdiction, and the appeal bond was signed by only one of the defendants, upon motion to dismiss the appeal the district court properly allowed the defendants to file a new bond with the signatures of both defendants and denied the motion to dismiss.—*Engel et al. v. Atkins et al.*, 267.

Same—Appearance—Waiver—Jurisdiction—In an appeal from the county to the district court of a cause wherein the district court had original jurisdiction, where the appellees moved to dismiss the appeal because of a defective appeal bond, which was denied and the appellees did not stand on their motion but proceeded to take part in the trial of the cause upon its merits, they thereby entered their general appearance and waived all irregularities in the manner of the appeal affecting the court's jurisdiction of their persons.—*Ib.*

Bills and Notes—Action Upon—Defense—Partnership—In an action upon a promissory note payable to E. & E., where it was alleged that E. & E. was a copartnership firm and that plaintiffs were the partners, an answer which denied that plaintiffs composed the firm of E. & E. to whom the note was payable and denied their ownership and alleged that one S. E. was the sole member of the firm of E. & E. to whom the note was payable and was then the owner thereof, and which alleged a defense which would be good as against S. E. but which would not be good as against plaintiffs, stated a sufficient defense to the action.—*Ib.*

PRACTICE IN CIVIL ACTIONS—Continued.

Evidence — Incompetent — Insufficient Objection—An objection to the cross-examination of a witness as to the contents of a letter on the ground that the witness should be permitted to see the letter and refresh her memory as to what she said, was insufficient to present the objection that the letter itself was the best evidence and that secondary evidence of its contents was incompetent.—*Rice et al. v. Williams et al.*, 330.

Evidence—Motion to Compel Opponent to Introduce Letters—A party cannot by motion compel his opponent to introduce letters in evidence, but should offer them in evidence himself.—*Ib.*

Juries—Equitable Action—Suit to Cancel Deed—An action to cancel a deed on the ground of fraud in its procurement is an equitable action and it is discretionary with the court whether or not issues of fact shall be submitted to a jury, and a denial of a demand for a jury trial is not error.—*Kyle v. Shore et al.*, 355.

Contracts — Rescission — Fraudulent Representations —In an action to rescind a contract to purchase land and to recover back the purchase price on the ground of deceit and false and fraudulent representations by the seller as to the location of the land, the crops it would grow and the depth at which water could be procured, where the evidence shows that plaintiff went upon and examined the premises before purchasing and that the only statements made by the seller as to the crops it would grow and the depth at which water could be found were mere expressions of opinion based on the crops grown and the depth of water on adjacent lands, the court properly directed a verdict for defendant.—*Muir v. Pratt et al.*, 363.

Mines and Mining—Adverse Suit—View of Premises—In an adverse suit to determine the right to a mining claim where the plaintiff's claim was put in issue by the pleading and he introduced no evidence whatever in support of his claim, he was not entitled to demand a view of the premises by the jury as provided in section 188a, Mills' Ann. Code, and a denial of such demand by the trial court was not error.—*Connolly v. Hughes et al.*, 372.

Evidence—Discretion of Court—The form of questions and method of examination of witnesses are largely within the discretion of the trial court, and unless there is an arbitrary abuse of such discretion, the trial court's action in such matters will not be held to be reversible error.—*Burson v. Bogart*, 449.

PRACTICE IN CIVIL ACTIONS—Continued.

Pleading—Misjoinder—Demurrer—Waiver—A failure to demur to a complaint on the ground of misjoinder of parties waives the objection.—*Johnson et al. v. Bott*, 469.

Pleading—Practice—Joint Judgment—Harmless Error—Where a complaint stated a separate cause of action against each of two defendants, and the cause was proven as to each, the fact that a joint judgment was rendered against the two was not prejudicial error.—*Ib.*

Inconsistent Positions—Election of Counts—Where plaintiff upon motion of defendant was required to elect which of two counts he would proceed upon, and defendant in making his motion and the court in acting thereon conceded that the count elected was upon contract, and throughout the trial the count was treated as upon contract, defendant will not be heard to say upon appeal, in order to secure an affirmance, that the count is in tort.—*Rucker v. The Omaha and Grant Smelting and Refining Co.*, 487.

Attachment—Action Upon Undertaking—Election of Counts—In an action upon an undertaking in attachment where plaintiff stated in one count a cause of action for the wrongful suing out of the writ and in another a cause of action for malicious prosecution in its issuance, it was error to require plaintiff to elect upon which of the two counts he would proceed.—*Ib.*

Election of Counts—Waiver—Where a plaintiff was erroneously required to elect as to which one of two counts he would proceed upon, the error was not waived by going to trial upon the count so elected.—*Ib.*

Continuance—Absent Witness—An application for a continuance on account of an absent witness who resides in a different county from that of the trial is insufficient unless it appears that an order of court has been obtained authorizing service of a subpoena outside of the county where the trial is had.—*Abby v. Dexter*, 498.

Same—An application for a continuance on account of an absent witness is insufficient where the affidavit fails to allege that there are no other witnesses by whom the facts can be proven. A statement that "affiant knows of no other witnesses by whom said facts can be proven, whose testimony can be so readily procured," was not sufficient.—*Ib.*

PRESUMPTIONS:

Summons—Alias—The clerk of a court has authority to issue an alias summons without an order of court where the original

PRESUMPTIONS—Continued.

has been destroyed. Where an alias summons was issued without an order of court and served, it will be presumed that the original was destroyed before the issuance of the alias and that the clerk had knowledge of its destruction and issued the alias upon proper application.—*Barra v. The People*, 16.

Appellate Practice—Findings—Where under the pleading and evidence the finding of the court could have been such as would sustain the judgment, it will be presumed that it was made.—*Gaboury v. Smith et al.*, 19.

Estates of Decedents—Administrators—Continuing Business of Deceased—Where an administrator under an order of court continued for three years a manufacturing business of the deceased, in the absence of a showing to the contrary, it will be presumed that the court acted wisely in making the order, and that it was necessary to continue the business for three years in order to wind it up to the best advantage of the estate.—*Fleming v. Kelly, Maus & Co.*, 23.

Law of Other State—Where the law of another state becomes material and there has been no evidence offered concerning it, our courts will presume that the general principles of the common law prevail there the same as in this state, but it will not be presumed that such other state has adopted the same or similar statutes as have been adopted in this state.—*Sullivan et al. v. The German National Bank et al.*, 99.

Mining Claims—Filing Adverse—Pleading—In an adverse suit where the complaint alleged the filing of the adverse in the United States land office, it will be presumed that it was filed within the time prescribed by the United States statutes for such filing.—*The Pennsylvania Mining Co. of Colorado v. Bales*, 108.

PRINCIPAL AND AGENT:

Power of Attorney—Partnership—A general power of attorney authorizing an agent to enter into possession of, control, sell and assign all real estate and other property belonging to the principal, does not empower the agent to enter into a copartnership agreement for his principal with any one.—*Guy v. Rosewater*, 1.

Contracts—Insurance—In an action by an insurance company against its local agent to recover premiums collected to its use, a counterclaim by defendant alleging a contract whereby plaintiff agreed in case it withdrew from the insurance business in defendant's territory nothing should be done to disturb the business on defendant's books, but that defendant should have the

PRINCIPAL AND AGENT—Continued.

option to reinsure all of its business in other companies or to take up all policies then in force at pro rata premiums less the cost of obtaining the same, and a breach of said contract whereby plaintiff without defendant's knowledge or consent retired from business in defendant's territory and caused its business to be reinsured by another insurance company without notice to defendant and without giving him an opportunity to exercise his option as provided in the contract, states a cause of action against the insurance company.—*Appelman v. The Broadway Insurance Co.*, 110.

Evidence—Agency may be established by evidence of facts and circumstances from which the existence of the agency may be conclusively presumed.—*Cheesman v. Nicholl*, 174.

Commission—Sale of Real Estate—Evidence—In an action by real estate agents for commission where the cause of action was based upon the ground that plaintiffs procured a customer and that through their efforts a sale was effected, evidence that prior to the date of giving the agency to plaintiffs by defendant other agents had introduced to defendant the party who subsequently became the purchaser through them, and that the negotiations with said purchaser through said other agents had never been broken off, was admissible in defense to show that the sale was not effected through plaintiffs' efforts, and its exclusion was error.—*Smiley v. Bradley et al.*, 191.

Same—Instructions—In an action by real estate agents for commission under a specific contract of agency in writing, where plaintiffs based their cause of action on the ground that a sale had been effected through their efforts, and where there was evidence tending to show that negotiations were pending between defendant and the purchaser through other agents prior to the time defendant gave to plaintiffs the agency, and that said negotiations subsequently resulted in a sale, it was error to instruct the jury not to consider any proposition of sale or trade between any parties and defendant prior to the agency contract between defendant and plaintiffs.—*Ib.*

Sales—Fraudulent Representations—Reliance of Agent—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and that the sale was made through defendant's false and fraudulent representations, where plaintiff had no personal knowledge of the transaction but made the purchase entirely through an agent, it was sufficient to show the agent's

PRINCIPAL AND AGENT—Continued.

reliance upon the representations and was not necessary to show plaintiff's reliance thereon.—*Geraghty v. Randall*, 195.

Commission—Contracts—Offer and Acceptance—Defendant by oral instructions authorized plaintiff, her agent, to dispose of certain real estate for a certain amount in cash and an exchange of certain real estate belonging to the proposed purchaser, defendant to assume an encumbrance existing on the property to be taken by her in exchange and the purchaser to assume an encumbrance existing on defendant's property, the principal sum of the encumbrance being named in each case. Plaintiff submitted the proposition to the proposed purchaser, who accepted by wire, directing that his attorney prepare the contract of sale which would be signed by his agent and that the contract should make the deal subject to perfect titles and interest on encumbrance, rents and insurance in each case to be adjusted to date of contract. Defendant refused to consummate the sale. Held, that defendant's oral proposition implied that if accepted the agreement should be made effective by being reduced to writing; that the term "perfect title" used in the acceptance was synonymous with marketable title, and that defendant's proposition implied that the titles should be marketable; that defendant's proposition naming the principal of the encumbrance in each case implied that each party should pay the interest on their respective encumbrances up to the date of the contract, and the law implied that each party was entitled to collect rent on his or her property and should bear the expense of insurance, if any, up to the time of the contract of sale. That the acceptance of defendant's offer was unqualified, and the proposed purchaser being ready, willing and able to comply with the terms of the proposition, defendant was liable to plaintiff for commission.—*Ross v. Smiley*, 204.

Estates of Decedents — Executors — Power to Sell Land — Employment of Agent—Commission—Where a will empowers an executor to sell land, the executor has power to employ an agent to aid him in effecting such sale and to contract to pay the agent commission, and an agent so employed who effects a sale may maintain an action against the executor as such for his commission. The amount of commission that an executor may contract to pay an agent is not limited by section 4805, *Mills' Ann. Stats.*, prescribing the compensation of executors for selling land.—*Ingham v. Ryan*, 347.

PRINCIPAL AND AGENT—Continued.

Corporations—Powers of Agent—Bills and Notes—The general manager of a corporation organized for the purpose of dealing in and raising cattle and other stock and acquiring lands and other property necessary to its business, who had charge of the corporation's business with authority to represent the company in such transactions as are usually incident to such business, has no implied authority to execute in the name of the corporation a promissory note and bind the company thereby.—*The Sanford Cattle Co. v. Williams*, 378.

Same—Notice—The fact that the manager of a corporation who executed an unauthorized promissory note of the corporation was also a director would not charge the corporation with notice of the unauthorized act.—*Ib.*

Same—Authority of an agent to purchase property for a corporation and to contract an indebtedness against the corporation therefor would not include the power to execute and bind the corporation to pay a promissory note due in eighteen months with a higher rate of interest than the legal rate and ten per cent. attorney's fee if collected by an attorney.—*Ib.*

Evidence—Declarations of Agent—Neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent.—*Burson v. Bogart*, 449.

Evidence—Evidence examined and held not sufficient to establish agency so as to make defendant, the alleged principal, liable for goods purchased from plaintiff by the alleged agent.—*Ib.*

PRINCIPAL AND SURETY:

Forfeited Recognizance—Search for Defendant—The fact that the surety upon a forfeited recognizance was at the time making search for his absconding principal with a view of procuring his presence in court does not excuse his neglect to plead to an action upon the forfeited recognizance and is not a sufficient showing to set aside a default judgment.—*Barra v. The People*, 16.

Bills and Notes—Collateral Security—Where certain notes were placed in a bank for collection to secure first a liability of the cashier of the bank upon a bond of the holder of the notes, and second, to secure a note by the holder to plaintiff, and the bank agreed to collect said notes and so apply the proceeds, when the bank had collected sufficient money on said notes to satisfy the liability of the cashier and pay off plaintiff's note plaintiff could maintain an action against the bank for the amount of his note, and he was not required to wait till the bond upon which the

PRINCIPAL AND SURETY—Continued.

cashier was liable was actually paid off before bringing his suit.
—*The Mercantile National Bank v. Peabody*, 455.

QUIETING TITLE:

Pleading—Judgment on Pleading—In an action to quiet title to an undivided three-fourths interest in a mining claim where the complaint disclosed the estate claimed by plaintiffs and the title by which the same was held, and one of the defendants answered alleging title to an undivided one-tenth interest in the claim, and from the answer it appeared that defendant deraigned title from the same source that plaintiffs deraigned title to part of their claim, and from the pleadings it appeared that the interests claimed by plaintiffs and defendant from a common source was in excess of the interest owned by their common grantor, the claim of defendant was to the extent of such excess adverse to plaintiffs' interest and it was error to strike out defendant's answer and enter judgment for plaintiffs on the pleading.—*Colburn v. Dortch et al.*, 96.

RECEIPTS:

Evidence—Unliquidated Claims—The rule that a receipt is only prima facie evidence of payment is applicable only to cases where the money is due and the amount is undisputed. If there is no disagreement as to amount a receipt for a less amount, in full of the demand, is without consideration and does not bind the creditor, but if the claim is unliquidated or the amount is in dispute a receipt in full is conclusive against the party giving it. Nor is the settlement affected by the fact that the creditor receives only what the debtor concedes to be due, nor that he takes the money under protest still asserting his claim to the balance.—*The Chicago, Rock Island & Pacific Railway Co. v. Mills*, 8.

Employer and Employee—Contracts—Wages—Plaintiff had been in defendant's employ as car repairer at fifty dollars per month. He testified that defendant agreed to raise his wages five dollars per month. His pay checks were continued to be made out for fifty dollars. The first one received after the claimed raise of wages he objected to, but his objection was not made to the person authorized to employ men for defendant. He continued in defendant's employ for fourteen months and each month his pay check was made out for fifty dollars, which he accepted and receipted as in full settlement of the month's wages. The person who employed plaintiff testified that his agreement to

RECEIPTS—Continued.

raise plaintiff's wages was conditioned upon his performance of the work of carpenter and car inspector, which he never performed. Held, that plaintiff was not entitled to recover the balance of the wages claimed.—*Ib.*

Deeds—Consideration—Parol Agreement—Where at the time of the execution and delivery of a deed to real estate the grantee by parol agreed to pay the grantor a certain sum in addition to the consideration recited in the deed if the grantee should ever utilize the property for any purpose and the grantee did utilize the property for a reservoir, the grantor could maintain an action for the additional consideration. And the fact that at the time of delivering the deed the grantor executed a separate receipt in which he acknowledged payment in full of all that was due would not defeat his action for the additional amount that afterwards became due upon the utilization of the property by the grantee.—*Cheesman v. Nicholl*, 174.

RECEIVERS:

Bills and Notes—Accommodation Paper—National Banks—Estoppel—Where a national bank had in violation of the national banking' act loaned to one person more than one-tenth of its paid-in capital stock, and a person executed his notes, one payable directly to the bank and others to payees who indorsed them and delivered them to the bank, which were credited upon the unauthorized loan thus reducing the loan to an amount within the statute, the maker is liable on such notes in the hands of a receiver of the bank, notwithstanding they were executed purely as a matter of accommodation to the borrower and notwithstanding said borrower may have owned nearly all the capital stock of said bank and had complete control thereof. Even though the bank knew the notes were accommodation paper and accepted them under conditions that would have precluded its recovery thereon, the notes having been executed for the purpose of giving the bank the appearance of holding genuine and valid assets, the maker is estopped to say as against the creditors of the bank that they were other than what they appeared on their face to be.—*Murphy v. Gumaer*, 183.

Assignment for Benefit of Creditors—Jurisdiction—A receiver appointed by the district court to take possession of the assets of an insolvent defendant is entitled to administer such assets in preference to an assignee under an assignment for the benefit of creditors made by said defendant pending the action in which the

RECEIVERS—Continued.

receiver was appointed and prior to his appointment, but after the court had acquired jurisdiction in the action for his appointment by the filing of the complaint and service of summons.—*Flint v. Powell*, 425.

REFEREES:

Partnership—Accounting—Evidence—Harmless Error—In an action for an accounting between two partners where a vast number of exhibits were introduced before the referee by both parties, the judgment of the court will not be reversed for refusing to strike out certain exhibits, even though they were incompetent, where the findings of the referee were warranted by other documentary and oral testimony introduced at the hearing.—*Johnson v. Johnson*, 493.

Appellate Practice—Findings—The findings of a referee upon conflicting evidence are entitled to the same consideration in the appellate court as the verdict of a jury or findings of the trial court.—*Ib.*

REPLEVIN:

Sales—False Representations—Transfer to Innocent Purchaser—Where a party obtained possession of a typewriter by false and fraudulent representations that he was agent for another party for whom he was making the purchase, and after so obtaining possession sold it to an innocent purchaser, the party who obtained it by fraud acquired no title and conveyed none to the innocent purchaser, and the owner was entitled to recover the same from such innocent purchaser by replevin.—*The Smith-Premier Typewriter Co. v. Stidger*, 261.

Ownership—Evidence—Evidence examined and held sufficient to establish ownership and right of possession in plaintiff in a replevin suit for property levied on and held by defendants under executions against other parties.—*A. Leschen & Sons Rope Co. v. Craig et al.*, 353.

Pleading—Estoppel—In an action of replevin by the owner to recover property levied on and held under executions against other parties a defense that plaintiff is estopped to assert ownership of the property as against the execution creditors because the execution defendants were permitted to hold themselves out as owners so as to justify said creditors in believing that they were the owners, cannot be relied on unless it is pleaded.—*Ib.*

SALARIES AND FEES:

Costs—County Judges' Fees—Trials—Statutory Construction—Under the provisions of 3 Mills' Ann. Stats., section 1901, fixing a fee for county judges for each trial or hearing of a cause in the county court, to be taxed against the losing party, a county judge is not entitled to collect from the county a trial fee in a misdemeanor case disposed of by nolle prosequi.—The Board of County Commissioners of Garfield County v. Beardsley, 55.

Costs—County Judges' Fees—Claims Against County—A county judge is not entitled to collect from the county fees and expenses for attending district court to defend the jurisdiction of the county court in misdemeanor cases.—Ib.

District Attorneys—Assistants—Power of Court to Appoint—Compensation—Claim Against County—The district court has inherent power, in the exercise of a proper discretion, to appoint counsel to assist the district attorney in the prosecution of criminal cases, subject to review in the appellate courts for the abuse of such discretion, and such assistant is entitled to compensation for his services to be paid by the county charged with the payment of the expenses of such prosecution.—The Board of County Commissioners of Hinsdale County v. Crump, 59.

Same—Value of Services—Allowance by Court—Evidence—Where counsel was appointed by the district court to assist the district attorney in the prosecution of a criminal case, an allowance by the court of compensation to such counsel for his services is at least prima facie evidence of the value of the services.—Ib.

Same—Verification of Claim—Where counsel was appointed by order of the district court to assist the district attorney in the prosecution of a criminal case and an allowance made by the court for his services, in presenting the claim to the board of county commissioners for allowance, it is not necessary that it be verified by the affidavit of the claimant, but the claim is sufficiently proven by a certified copy of the order making the appointment.—Ib.

Officer's Fees—Right to Receive—Performance of Service—The right of a public officer to demand and receive fees for services depends upon the rendition of the services.—McMullin v. Montrose County, 117.

District Attorneys—Performance of Service—A district attorney is not entitled to demand and receive commission from a county upon a sum received by the county in settlement of a suit against the county treasurer and sureties upon his official bond to recover a shortage in the treasury fund, where the suit

SALARIES AND FEES—Continued.

was brought by the county attorney and the only thing the district attorney did in connection with the suit was to request that his appearance be entered for the county which was done upon motion of the county attorney, the suit having been compromised and settled for a smaller sum than that claimed shortly after the entry of the appearance of the district attorney and dismissed by the county attorney, the district attorney taking no part in such settlement although the district attorney was ready and willing to perform any necessary service connected with said suit had he been requested to do so by the county attorney or commissioners.—Ib.

SALES:

Breach of Contract to Buy—Measure of Damage—Market Price—Cost of Production—Instructions—In an action for damages for breach of contract to purchase the output of a coal mine, if the output of the mine could have been sold in the market at a price above the cost of production the measure of plaintiff's damage would be the difference between the price agreed to be paid by defendant and the market price. And in the absence of a showing that there was no market value, an instruction that the measure of damage was the difference between the contract price and the cost of producing the coal named in the contract, was erroneous.—*Kincaid et al. v. Price et al.*, 73.

Contracts—Liens—Where the owners of certain mining claims contracted with attorneys to pay them a certain fee for services connected with said claims and agreed to pay the same out of the purchase money to be received from the sale of said property, a certain per cent. of said purchase money to be paid to said attorneys as it was received and the balance of their stipulated fee to be paid when the final payment was made of the purchase price, and providing that said attorneys were "to receive and be interested in the purchase money on said mine to the extent of" the designated sum, the contract did not create a lien on said mining claims, nor operate to transfer an interest in the purchase money until after it should come into the hands of the vendors, and no right of action accrued in favor of said attorneys against the purchasers of said mining claims who purchased with notice of such contract.—*Weiss et al. v. Gullett et al.*, 122.

Personal Property—Possession—Statute of Frauds—To sustain a sale of personal property as against the creditors of the vendor, the possession taken and retained by the vendee must be actual,

SALES—Continued.

open, notorious, unequivocal and exclusive. There must be no apparent possession left in the vendor. And it is immaterial whether or not the sale was bona fide or whether or not creditors had knowledge of it, unless it was followed by the required change of possession.—*Willis v. Roberts*, 149.

Same—Evidence—Evidence examined and held not sufficient to constitute such change of possession as will sustain a sale of personal property as against creditors of the vendor.—*Ib.*

Fraudulent Representations — Evidence — Admissions —In an action by a purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and was purchased through the false and fraudulent representations of defendant, defendant's admissions were competent evidence against him.—*Geraghty v. Randall*, 195.

Fraudulent Representations—Principal and Agent—Reliance of Agent—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the stock was worthless and that the sale was made through defendant's false and fraudulent representations, where plaintiff had no personal knowledge of the transaction but made the purchase entirely through an agent, it was sufficient to show the agent's reliance upon the representations and was not necessary to show plaintiff's reliance thereon.—*Ib.*

Fraud—Juries—Verdict—Special Finding—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the sale was effected through the false and fraudulent representations of defendant the jury returned a general verdict for plaintiff, and in answer to a special interrogatory found that defendant was guilty of fraud and wilful deceit. The court sustained the general verdict but set aside the special finding on the ground that it was not sustained by the evidence. Held, that the action of the court was not inconsistent and that its action in setting aside the special finding will not be construed as a ruling that there was no evidence of fraud upon which to base the general verdict, but that there was not sufficient evidence of fraud and wilful deceit to warrant a verdict the effect of which was to authorize execution against the body of defendant.—*Ib.*

Mortgages — Foreclosure — Sheriff's Deed — Order of Court Approving Sale—A sheriff's deed made in pursuance of the certificate of sale on the foreclosure of a mortgage is not void because no order of court approving the sale was made prior to

SALES—Continued.

the execution of the deed.—*De Cunto, Barra & Co. v. Johnson*, 220.

False Representations—Transfer to Innocent Purchaser—Replevin—Where a party obtained possession of a typewriter by false and fraudulent representations that he was agent for another party for whom he was making the purchase and after so obtaining possession sold it to an innocent purchaser, the party who obtained it by fraud acquired no title and conveyed none to the innocent purchaser, and the owner was entitled to recover the same from such innocent purchaser by replevin.—*The Smith-Premier Typewriter Co. v. Stidger*, 261.

Jurisdiction—Injunction—The district court of a county is not without jurisdiction to restrain the sheriff of that county from executing a deed for property in that county sold under a special execution, because the judgment on which the execution was issued was rendered by the district court of another county.—*The Ohio Colo. Mining Co. v. Wiley*, 311.

Negligence of Purchaser—Mistake of Seller—Where plaintiff sold to defendant wheat supposing that he was selling smutty, no-grade wheat and under such circumstances that he was justified in such supposition and defendant ought to have known that plaintiff was acting upon such supposition, and defendant either knowingly or negligently permitted plaintiff to act upon such supposition to plaintiff's disadvantage, the result is the same as if the transaction had been the deliberate and intentional act of both parties and defendant is liable for the agreed price.—*Butterfield v. Butterfield*, 323.

Evidence—Evidence examined and held sufficient to establish a sale of smutty wheat and the purchaser's liability for the agreed price.—*Ib.*

Warranties—Evidence—Burden of Proof—In an action for the price of goods purchased by a written contract or order where defendant answered that the goods were purchased upon certain representations and warranties which were not true, and the written evidence of the contract discloses no such representations or warranties, the burden is upon the defendant to prove them.—*The Colo. Dry Goods Co. v. W. P. Dunn Co.*, 409.

Same—Plaintiff sold to defendant for advertising purposes a number of copies of a picture beneath which was printed "The War Congress of the United States of America." It contained the portraits of all the members of the house of representatives elected at the general election to that congress. Six of these

SALES—Continued.

members had died before the war resolutions were passed. It was not shown whether or not their successors had been elected prior to the passage of the resolution. None of these successors were included in the picture. Held, that there was no breach of warranty that the picture contained all the members of the house at the time war was declared.—Ib.

Deeds of Trust—Unauthorized Foreclosure—Negotiable Instrument—Where the trustee in a deed of trust without a request or authority from the holder of the note secured thereby foreclosed the deed of trust, his deed conveyed no title and could not be used as an obstruction to a proceeding for foreclosure by the owner of the note whether or not the note was negotiable.—*The Mosca Milling and Elevator Co. v. Murto*, 437.

Same—Action to Set Aside Trustee's Deed—Fraud—Burden of Proof—In an action by the holder of a note secured by a deed of trust to set aside a trustee's deed on the ground that the foreclosure by the trustee was without authority and fraudulent, and asking for foreclosure of the deed of trust, the burden of proof is upon the plaintiff to show the invalidity of the foreclosure sale.—Ib.

Deeds of Trust—Foreclosure—Recitals in Trustee's Deed—Prima Facie Evidence—Where a deed of trust provided that in case of foreclosure by the trustee the recitals in the trustee's deed should be prima facie evidence of the facts therein stated, a trustee's deed thereunder reciting that application for foreclosure had been made by the legal holder of the note was prima facie evidence that such application had been made, and in an action by the holder of the note to set aside the trustee's deed on the ground that no application was made for the foreclosure, it was error to refuse to allow defendant to introduce said trustee's deed in evidence until he had shown by other evidence the authority of the trustee to act.—Ib.

Deeds of Trust—Foreclosure—Application of Purchase Money—Where a deed of trust provided that in case of foreclosure the purchaser should not be required to see to the application of the purchase money, payment to the trustee by the purchaser at a foreclosure sale was sufficient and he was not required to prove that the money was paid to the holder of the note to establish the validity of the trustee's deed.—Ib.

Corporations—Evidence—In an action against a corporation for goods sold to another corporation the testimony of the seller

SALES—Continued

that the corporation to whom the goods were sold was afterwards called by the name of the corporation sued is insufficient to sustain a judgment against the corporation sued, where defendant's evidence showed that the two corporations were separate and distinct and that defendant was not a successor of the corporation to whom the goods were sold.—*The Bullion Milling Co. v. The Gates Iron Works*, 472.

Attorneys' Liens—Waiver—Contracts—An agreement between an attorney and his clients whereby the attorney at a sale of land, under a decree obtained by him for his clients, was to purchase the property in trust for his clients and sell the same and out of the proceeds pay his fee and costs was a waiver of his attorney's lien.—*Teller v. Hill*, 509.

SCHOOL OF MINES:

Board of Trustees — Diplomas — Mandamus — The board of trustees of the school of mines has no authority to issue a diploma to a student of the school except when required to do so by the school speaking through its faculty. And mandamus will not lie to compel the board of trustees to issue such diploma where the plaintiff has failed to pass the examination required by the faculty, although his failure may have been chargeable to the hostility and wrongful conduct of the faculty.—*Steinhauer et al. v. Arkins*, 49.

STATUTE OF FRAUDS:

Contracts—Easements—Parol—Water Rights—A parol contract whereby plaintiff was to construct a ditch through the land of defendant and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch.—*Croke v. The American National Bank*, 3.

Sales—Personal Property—Possession—To sustain a sale of personal property as against the creditors of the vendor, the possession taken and retained by the vendee must be actual, open, notorious, unequivocal and exclusive. There must be no apparent possession left in the vendor. And it is immaterial whether or not the sale was bona fide or whether or not creditors had knowledge of it, unless it was followed by the required change of possession.—*Willis v. Roberts*, 149.

STATUTE OF FRAUDS—Continued.

Same—Evidence—Evidence examined and held not sufficient to constitute such change of possession as will sustain a sale of personal property as against creditors of the vendor.—*Ib.*

Contracts—Promise to Pay Debt of Another—Pleading—In an action upon an oral contract the defense that it was an agreement to answer for the debt of another and void under the statute of frauds because not in writing is not available to defendant unless the statute be pleaded.—*The Cerrusite Mining Co. v. Steele*, 216.

Same—Money Had and Received—Where defendant agreed to pay the board and store bills of its employees to plaintiff and to deduct the same from their wages and did deduct from their wages the amount of such bills, the amounts thus deducted became so much money received by defendant to plaintiff's use and the debt became defendant's own and it cannot interpose as a defense thereto that it was an agreement to answer for the debt of another.—*Ib.*

Promise to Pay Debt of Another—Landlord and Tenant—Where plaintiff sold to a tenant goods and charged them upon his books to such tenant, a promise by the landlord to pay such account, made without consideration, was a promise to pay the debt of another within the statute of frauds, and was not binding unless made in writing.—*Burson v. Bogart*, 449.

Same—Instructions—Not Based on Evidence—Where defendant verbally promised to pay to plaintiff the store account of his tenant after the goods had been sold and charged to the tenant, and there was no evidence of any consideration passing from plaintiff to defendant or that plaintiff released the tenant and accepted defendant as his debtor, an instruction to the effect that where there is a consideration for the promise to pay, it is unnecessary for it to be in writing and that to warrant a finding for plaintiff it must appear that he accepted defendant and released the tenant, was prejudicial error.—*Ib.*

STATUTE OF USES:

Conveyances—Trusts—The statute of uses (27 Henry VIII, chap. 10) is in force in Colorado, and where land is conveyed to one person for the use of or in trust for others, by a deed which expresses a mere passive trust, the legal as well as the equitable title vests thereby in the cestuis que trust and the trustee takes nothing.—*Teller v. Hill*, 509.

STATUTORY CONSTRUCTION:

Costs—County Judges' Fees—Trials—Under the provisions of 3 Mills' Ann. Stats., section 1901, fixing a fee for county judges for each trial or hearing of a cause in the county court, to be taxed against the losing party, a county judge is not entitled to collect from the county a trial fee in a misdemeanor case disposed of by nolle prosequi.—*The Board of County Commissioners of Garfield County v. Beardsley*, 55.

Negligence—County Commissioners—Duty to Examine Jail—Injury to Prisoner by Fire—Liability of Commissioners—Section 2523, Mills' Ann. Stats., requiring county commissioners to make personal examination of the county jail, its sufficiency and management at each session of the board and to correct all irregularities and improprieties therein found, imposes a public official duty and the commissioners are not individually liable thereunder to an action for damages for the death of a prisoner caused by the burning of the county jail, alleged to have been caused by their negligent failure to make such examination.—*Miller v. The Ouray Electric Light and Power Co.*, 131.

Cities and Towns—Franchises—Sewers—Section 4403, subdivision 10, Mills' Ann. Stats., authorizing cities and towns to construct sewers, regulate their use and to make special assessments against adjacent lots and lands for the purpose of such construction, limits the powers of municipal corporations in relation to sewers to those expressed in said subdivision. An ordinance purporting to grant to a private person an exclusive right and privilege to construct and operate a system of sewers within the limits of a municipal corporation and to collect from all persons using the same a reasonable annual compensation for connecting therewith is absolutely void, and one constructing a sewer system under such ordinance cannot maintain an action against an inhabitant of the city for the use of the same.—*Weaver et al. v. The Canon Sewer Co.*, 242.

Estates of Decedents—Evidence—In an action against an administrator a conversation between the administrator and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent, is not prohibited from admission in evidence by section 4816, Mills' Ann. Stats.—*Tourtelotte v. Brown*, 335.

SUMMONS:

Alias—Presumption—The clerk of a court has authority to issue an alias summons without an order of court where the

SUMMONS—Continued.

original has been destroyed. Where an alias summons was issued without an order of court and served it will be presumed that the original was destroyed before the issuance of the alias and that the clerk had knowledge of its destruction and issued the alias upon proper application.—*Barra v. The People*, 16.

Default—Motion to Set Aside—Appearance—A motion to set aside a default judgment on account of excusable neglect was a general appearance and waived the right to question the sufficiency of the summons.—*Ib.*

TAX SALES:

Liens—Personal Tax—Where land is sold for taxes assessed against the land and also for personal taxes assessed against the owner, the certificate of purchase invests the purchaser with a lien for the taxes assessed against the land superior to all liens, and also with a lien for the amount paid on account of the personal taxes of the owner, which is subject to prior liens.—*Statton v. The People*, 85.

Same—Redemption—Mandamus—Equity—Parties—Where land covered by a deed of trust was sold for taxes part of which were assessed against the land and part of which were assessed as personal tax of the owner, in a proper proceeding the beneficiary of the trust deed is entitled to a release as to his interest in the land from the tax sale by payment only of the amount properly chargeable against the land, but mandamus will not lie against the county treasurer to compel him to release said land from the tax sale except upon payment of the entire amount for which it was sold with interest and penalties. The proper remedy would be a proceeding in equity against the holder of the certificate of purchase.—*Ib.*

Cities and Towns—Sewer Taxes—Failure to Record Tax Sales—Estoppel—Where a special sewer tax was assessed against a city lot but no record thereof was made either in the office of the county treasurer or county clerk, and twelve years after such assessment was made the city attempted to enforce its lien by causing said lot to be sold for said tax, the city was estopped to assert its tax lien as against a purchaser of the lot who purchased without notice of such tax and after an examination of the records for tax liens, and who received no notice of the tax or the tax sale until the purchaser at the tax sale applied for a deed upon his tax-sale certificate. The holder of the tax-sale certificate was not entitled to a deed, and the tax lien and certificate should be annulled.—*Elder et al. v. Fox et al.*, 263.

TAX SALES—Continued.

Cities and Towns—Sewer Taxes—Tax Sales—Caveat Emptor—The rule of caveat emptor applies to a purchaser at an invalid tax sale of a city lot for delinquent sewer taxes, and neither the purchaser nor his assignee of the tax-sale certificate is entitled to recover from the city the amount due upon such certificate.—Ib.

TRUSTS AND TRUSTEES:

Statute of Uses—Conveyances—The statute of uses (27 Henry VIII, chap. 10) is in force in Colorado, and where land is conveyed to one person for the use of or in trust for others, by a deed which expresses a mere passive trust, the legal as well as the equitable title vests thereby in the cestuis que trust and the trustee takes nothing.—Teller v. Hill, 509.

Same—Judgment Liens—Where land was deeded to one person for the use of others by a deed which merely expressed a passive trust and such deed was recorded, a title in fee was thereby vested in the cestuis que trust, and a transcript of judgment against the cestuis que trust being filed, the judgment lien thus created in favor of the judgment creditors was superior to any secret lien or trust existing in favor of the trustee created by oral agreement between the trustee and the cestuis que trust of which the judgment creditors had no notice.—Ib.

Same—Attorneys' Liens—Where land was conveyed to a trustee for the use of other parties by a deed which expressed a mere passive trust, which deed was recorded, a judgment lien created by filing a transcript of judgment against the cestuis que trust was superior to an attorney's lien in favor of the trustee of which the judgment creditors had no notice.—Ib.

Attorneys' Liens—Waiver—Contracts—An agreement between an attorney and his clients whereby the attorney at a sale of land, under a decree obtained by him for his clients, was to purchase the property in trust for his clients and sell the same and out of the proceeds pay his fee and costs was a waiver of his attorney's lien.—Ib.

VENUE:

Bills and Notes—Where a promissory note was made payable at a certain bank, the county in which such bank is situated was the proper county for trial of an action thereon, although defendants resided and were served with summons in another county, and an application to change the place of trial to the county of

VENUE—Continued.

defendants' residence was properly denied.—Coulter et al. v. The Bank of Clear Creek County, 444.

VERDICTS:

Sales—Fraud—Juries—Special Finding—In an action by the purchaser of mining stock against the seller to recover back the purchase price on the ground that the sale was effected through the false and fraudulent representations of defendant, the jury returned a general verdict for plaintiff, and in answer to a special interrogatory found that defendant was guilty of fraud and wilful deceit. The court sustained the general verdict but set aside the special finding on the ground that it was not sustained by the evidence. Held, that the action of the court was not inconsistent and that its action in setting aside the special finding will not be construed as a ruling that there was no evidence of fraud upon which to base the general verdict, but that there was not sufficient evidence of fraud and wilful deceit to warrant a verdict the effect of which was to authorize execution against the body of defendant.—Geraghty v. Randall, 195.

WARRANTIES:

Sales—Evidence—Burden of Proof—In an action for the price of goods purchased by a written contract or order where defendant answered that the goods were purchased upon certain representations and warranties which were not true, and the written evidence of the contract discloses no such representations or warranties, the burden is upon the defendant to prove them.—The Colo. Dry Goods Co. v. W. P. Dunn Co., 409.

Same—Plaintiff sold to defendant for advertising purposes a number of copies of a picture beneath which was printed "The War Congress of the United States of America." It contained the portraits of all the members of the house of representatives elected at the general election to that congress. Six of these members had died before the war resolutions were passed. It was not shown whether or not their successors had been elected prior to the passage of the resolution. None of these successors were included in the picture. Held, that there was no breach of warranty that the picture contained all the members of the house at the time war was declared.—Ib.

WATER RIGHTS:

Findings—Decrees—Departure—In an action to enjoin defendant from interfering with plaintiff's easement to flow water

WATER RIGHTS—Continued.

through a ditch to irrigate certain land, where the court finds plaintiff entitled to use the ditch in question to carry water to irrigate the land designated, subject however to defendant's rights to carry water to irrigate certain other land, a decree which gives plaintiff the right to use the ditch without regard to whether it is being used by defendant is a departure from the findings and will be modified to correspond with the findings.—*Croke v. The American National Bank*, 3.

Contracts—Easements—Parol—A parol contract whereby plaintiff was to construct a ditch through the land of defendant and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch.—*Ib.*

Same—Notice—Where one has an easement in a ditch through the lands of another based on an oral contract and had been in open visible use of the ditch for irrigation purposes for several years up to the time the land was sold without any exception of the easement, the purchaser took the land charged with notice of the easement and subject thereto.—*Ib.*

Conveyances — Easements — Evidence — Estoppel—Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement, in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parol grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed from witness to defendant. Plaintiff not being a party to the deed, was not estopped by the recitals therein.—*Ib.*

Easements—Equity Jurisdiction—An action to protect an easement in a ditch used for irrigation is peculiarly within the jurisdiction of equity.—*Ib.*

Conveyances—Easements—An easement such as the right to use an irrigating ditch to carry water for the purpose of irrigating land will pass as an appurtenance to the land without specific mention in the deed if such was the intention of the grantor, and the deed being silent such intention may be gathered from the presumptions arising from the circumstances surrounding the transaction.—*The American National Bank v. Hoeffler*, 53.

WATER RIGHTS—Continued.

Same—A. owned two separate tracts of land and constructed a ditch across one tract to carry water for the purpose of irrigating the other. A. conveyed both tracts to S., but by separate deeds and at different times and without specific mention of the ditch. S. conveyed the tract irrigated by the ditch to H., and several years later conveyed the land across which the ditch was constructed to plaintiff, and H. conveyed with all appurtenances the tract so irrigated to defendant. None of the deeds specifically mentioned the ditch. During the ownership of A., S. and H., the ditch was continuously, openly and visibly used to irrigate the land passed to defendant. Held, that the circumstances surrounding the conveyances raised a reasonable presumption that it was the intention of each of the grantors to convey the easement in the ditch, and under such presumption defendant was the owner of such easement, and that it was error to enjoin defendant from using the same.—Ib.

Irrigation—Water Divisions—Counties Liable for Compensation of Superintendent—All counties which contain lands that are irrigated by water taken from any one or more of the streams mentioned in the act creating a water division are embraced within the division and are each liable for their respective shares of the compensation of the superintendent of irrigation for that division whether or not such lands are irrigated through ditches whose priorities have been established by judicial decree. But if a county has no land within it which is irrigated by water from such stream or streams it is not liable for any part of the superintendent's compensation, although it may contain lands lying within the course or watershed of such stream or streams.—*Chew v. Board of County Commissioners of Fremont County*, 162.

WILLS:

Contests—Evidence—In a trial in the district court on appeal from an order of the county court probating a will, the contestant is not limited to the testimony of the subscribing witnesses of the will, but is entitled to introduce any competent testimony as to the mental capacity of the testator.—*Ashworth v. McNamee et al.*, 85.

Estates of Decedents—Executors—Power to Sell Land—Employment of Agent—Commission—Where a will empowers an executor to sell land the executor has power to employ an agent to aid him in effecting such sale and to contract to pay the agent

WILLS—Continued.

commission, and an agent so employed who effects a sale may maintain an action against the executor as such for his commission. The amount of commission that an executor may contract to pay an agent is not limited by section 4805, Mills' Ann. Stats., prescribing the compensation of executors for selling land.—*Ingham v. Ryan*, 347.

Ex. J. M.
12/7/04

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